TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 195 27.

LI SING, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 31, 1900.
CERTIORARI AND RETURN FILED APRIL 30, 1900.

(17,274.)

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United States Circuit Court of Appeals for the Second Circuit.

n the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

Transcript of Record.

ppeal from the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. iled Dec. 13, 1897. William Parkin, clerk.

United States Circuit Court for the Southern District of New York.

n the Matter of the Petition of LY SING for a Writ of *Habeas Corpus.*

o the United States circuit court for the southern district of New York:

The petition of Li Sing respectfully shows:

That he is restrained of his liberty and is now in the custody of e marshal of the United States for the southern district of New ork.

That the cause or pretense of such detention, according to the nowledge and belief of your petitioner, is as follows:

Your petitioner is a Chinese merchant, a resident of the State of ew Jersey, domiciled in the city of Newark; and for many years st has been a resident of said city of Newark.

That in the year 1893, at or about the 22d day of June, your petiioner, being then a member of the firm of Sam Palume Co., who were then merchants engaged in buying and selling merchandise at 64 Springfield avenue, in said city of Newark, and having been a merchant and member of said firm for ore than a year previous thereto, left this country for the purse of temporarily revisiting his friends in China and bringing ck with him his son Ly Foon, and intending to return to this untry.

That before departing from this country your petitioner procured e usual certificate in accordance with the regulation of the Treasy Department. That upon leaving China to return to this coun- your petitioner procured the said certificate to be duly counterned by the representative of the United States Government at ong Kong. That your petitioner applied for admission into this untry to the United States collector at Malone, N. Y. That the d United States collector after examining and cancelling the cericates and papers of identification presented, duly decided that ur petitioner and his said son, Ly Foon, were duly entitled to ter and remain within the United States, and that your petitioner

and his said son, Ly Foon, thereupon came to the city of Newark, the said domicile of the said Ly Sing as aforesaid, where your petitioner has continued to be engaged in his business as a merchant as aforesaid.

That thereafter upon the complaint of J. T. Scharf, a United States inspector, your said petitioner was arrested charged with being unlawfully within the United States. That thereafter proceedings were had before the Hon. John A. Shields, U. S. commissioner, and that your petitioner has been committed on said charge.

Your petitioner is advised by Wm. C. Beecher, his counsel, who resides in the city of Brooklyn, and who is a counsellor of this court, that such restraint and detention is illegal and unauthorized, and that the said commissioner has erred in his proceedings and determination.

3 Wherefore, your petitioner prays for writs of *habeas corpus* and certiorari for the purpose of reviewing the proceedings and determination of said commissioner and of delivering and discharging your petitioner from custody.

Dated New York, —— —, 1897.

W. C. BEECHER.

CITY AND COUNTY OF NEW YORK, *ss:*

Li Sing, being duly sworn, says: That he is the defendant and petitioner herein; that he has had the foregoing petition read to him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters as are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

his
LI SING.
mark.

Sworn to before me this 24th day of June, 1897.

JOHN A. SHIELDS,
U. S. Commissioner.

(Endorsed:) United States circuit court. In the matter of the petition of Li Sing for a writ of *habeas corpus*. Writ of certiorari and petition. Wm. C. Beecher, attorney for petitioner; post-office and office address, 237 Broadway, New York city. Let petitioner be bailed in the sum of $300 for appearance on entering of final order herein, and Commissioner Shields is authorized to take such recognizance. June 24, 1897. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Jun- 24, 1897. John A. Shields, clerk.

4 The President of the United States to the marshal of the United States for the southern district of New York, and to his deputies or either of them:

We command you that you have the body of Ly Sing by you detained, as it is said, together with the time and cause of such de-

tention, by whatsoever name the said Ly Sing is called or charged, before one of the justices of the United States circuit court, at the court-room in the post-office building in the city of New York, on the 26th day of June, 1897, at 1 o'clock in the afternoon, to do and receive what shall then and there be considered concerning the said Ly Sing, and have you then and there this writ.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 24th day of June, 1897.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

The above writ allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court. United States *vs.* Ly Sing. Writ of *habeas corpus.* Wm. C. Beecher, attorney for petitioner; post-office and office address, 237 Broadway, New York city. To the marshal of the United States for the southern district of New York. Rec'd June 25, 1897, 2.55 p. m.

I do hereby certify that upon the coming of the within writ to me, to wit, at 2 o'clock and fifty-five minutes p. m., on the 25th day of June, 1897, there was no person of the name of Ly Sing in my custody nor has any such person since been in my custody; and I do hereby further certify that on the 24th day of June, 1897, the
5 within-named Ly Sing was in my custody upon the warrant of deportation herewith returned, and that on that day he was discharged upon bail as appears by the endorsement thereon. John H. McCarty, U. S. marshal. N. Y., June 24, 1897. Writ dismissed and relator remanded for deportation. See opinion in Ly Foon case Aug. 11, 1897. E. H. Lacombe, U. S. C. J. U. S. circuit court. Filed Aug. 12, 1897. John A. Shields, clerk.

At a stated term of the United States circuit court for the southern district of New York, held in the United States court and post-office building, in the city of New York, on the 18th day of August, 1897.

Present: The Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Petition of LI SING for a Writ of *Habeas Corpus* and Certiorari.

A writ of *habeas corpus* and a writ of certiorari herein having been allowed, and returns thereto having been duly filed by the United States marshal for the southern district of New York, and by John A. Shields, Esq., United States commissioner, respectively;

Now, after hearing Wm. C. Beecher, Esq., in favor of the writs, and Max J. Kohler, Esq., assistant United States attorney opposed, due deliberation being had, it is, on a motion of Wallace Mac-
6 farlane, Esq., United States attorney for the southern district of New York,

Ordered, that the writ of *habeas corpus* be and it is hereby dismissed, and it is further—

Ordered, that relator, Li Sing, be remanded to the custody of the United States marshal for the southern district of New York, for deportation under the order of deportation herein signed by Commissioner Shields.

E. H. LACOMBE,
U. S. Circuit Judge.

United States Circuit Court, Southern District of New York.

In the Matter of the Petition of LI SING for a Writ of *Habeas Corpus* and Certiorari.

Please take notice that an order of which the accompanying is a copy will be presented to the Hon. E. Henry Lacombe, U. S. circuit judge, for settlement on August 18, 1897, at 10.30 a. m., at the United States court-rooms in the post-office building in New York city, or as soon thereafter as counsel can be heard, and for such other relief as to the court may seem just and proper. You will also please take notice that the recognizance of relator is then and there returnable, and you are required to surrender him then
7 and there into the custody of the United States marshal, and, in default thereof, the recognizance will be forfeited.

Very respectfully,

WALLACE MACFARLANE,
U. S. Attorney, P. O. Building, N. Y. City.

To Wm. C. Beecher, Esq., attorney for relator, 237 Broadway; James Naughton, Esq., 611 Lexington Ave., surety for relator.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John V. B. Merritt, being duly sworn, says: That he is employed in the office of the U. S. attorney for the southern district of New York; that on the 12th or 13th day of August, 1897, he served a copy of the within order and notice upon William C. Beecher, Esq., by delivery to and leaving with the person in charge of said office at No. 237 Broadway, New York city, a true copy thereof, said William C. Beecher being then absent therefrom.

JOHN V. B. MERRITT.

Sworn to before me this 17th day of August, 1897.

GILBERT E. ROGERS,
Notary Public, Kings & N. Y. Counties.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Li Sing for writ of *habeas corpus*, &c. Order and notice. Wallace Macfarlane, United States attorney, attorney for defendant. U. S. circuit court. Filed Aug. 18, 1897. John A. Shields, clerk.

8 The President of the United States to the Hon. John A. Shields, United States commissioner for the southern district of New York:

We command you that you certify fully and at large to our circuit court for the southern district of New York, to be held at the court-house in the city of New York, on the 26th day of June, 1897, all of the proceedings before you had on the charge against Li Sing of being unlawfully within these United States, together with all the evidence taken before you. And have you then and there this writ.

Witness Hon. Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 24th day of June, 1897.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

The above writ allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court. United States *vs.* Li Sing. Writ of certiorari. Wm. C. Beecher, attorney for petitioner; post-office and office address, 237 Broadway, New York city.

THE UNITED STATES
vs.
LI SING.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, United States commissioner for the southern district of New York, in obedience to the foregoing writ of
9 certiorari, do hereby certify that the papers hereunto annexed and returned herewith contain the record of the proceedings had before me in the above-entitled matter.

New York, June 26, 1897.

JOHN A. SHIELDS,
U. S. Commissioner for the Southern District of New York.

UNITED STATES
vs.
LI SING. } Before Commissioner John A. Shields.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. Thomas Scharf, being duly sworn, deposes and says: That he is Chinese inspector for the port of New York; that he is informed and believes that Li Sing is a Chinese person now unlawfully within the United States and the southern district of New York, and that on or about the 27th of August, 1896, he entered the United States unlawfully, being a Chinese person not authorized by law to enter the United States; that said Li Sing, deponent is further informed, is a Chinese laborer, and has been such for several years last past, and presented no papers or certificates lawfully entitling

him as such laborer to enter the United States. That the sources of deponent's information and the grounds of his belief are investigations made by deponent in the course of his official duties, statements under oath made by Philip A. Gifford and others, and documentary evidence in deponent's possession.

J. THOMAS SCHARF.

Sworn to before me this 6th day of January, 1897.

JOHN A. SHIELDS,
U. S. Commissioner.

10 UNITED STATES } Before John A. Shields, U. S. Commissioner.
vs.
LI SING.

NEW YORK, *January* 20, 1897.

Appearances.

Max J. Kohler, assistant United States attorney, for the Government.
William C. Beecher, for defendant.

Counsel for defendant offers in evidence certificate as authenticated by the United States consul at Hong Kong, and which was received at the port of Malone, August 27, 1897, by the deputy collector.

Mr. KOHLER: I do not object to the paper as evidence to establish the fact that the defendant was admitted upon presentation of that paper. I do object to it, however, on the ground that it is not the certificate required by law to be produced by a Chinese merchant returning to the United States. Section 6 of the act of 1884 has been held by the supreme court not to be applicable to Chinese merchants returning to the United States, the evidence which they are required to produce being governed entirely by section 2 of the act of 1893. For that limited purpose, if the commissioner admits it, I have no objection.

Marked Exhibit A for identification.

Adjourned to Monday, January 25, 1897, at 2 p. m.
Adjourned to Monday, February 1, 1897, at 2 p. m.

11 NEW YORK, *February* 3, 1897.

Present: Same counsel as before.

Mr. BEECHER: I desire to enter a preliminary objection to the jurisdiction of the commissioner and of this court in these proceedings. Under the act of 1894 it rests with the collector's department to determine the legality of the entrance of a Chinaman into the United States. Perhaps at this stage it does not appear on the record, but it certainly will appear very shortly on the record, that the collector at Malone has officially passed upon the question and admitted the man, and I shall contend, and so far as I may raise it

now by the record I do contend, that this court and your honor have no jurisdiction to pass on the question.

Objection overruled. Exception.

Mr. BEECHER: I also move to dismiss the proceedings upon the ground that there is nothing before your honor sufficient to warrant the holding of the accused or show that he is unlawfully within the United States.

Motion denied. Exception.

Mr. BEECHER: I also claim that where the collector of the port has officially passed upon the right of entry, the burden of proof rests with the Government to show that the accused was improperly admitted. We claim that the burden is with the Government to show upon this examination some proof to warrant the commissioner in holding the accused. This is an examination upon a charge, and under all laws that I am familiar with the party accused has a right to ascertain what the facts are under which he is arrested and he is not obliged to go into any defense until a *prima facie* case is made out. Therefore I ask permission to examine the
12 party who makes the affidavit upon which this arrest is made—as part of the examination.

Overruled. Exception.

Mr. BEECHER: I offer in evidence certificate of the defendant Li Sing as authenticated by the Chinese consul in New York and by the United States consul at the port of Hong Kong, canceled August 7, 1896, by Deputy Collector Porter at Malone.

Mr. KOHLER: Objected to on the ground that this certificate purporting to be issued under section 6 of the act of 1882 as amended by the act of 1884 is not the proper evidence to be produced by a person claiming to be a Chinese merchant returning to the United States, that section having been held not to be applicable in such a case. I do not object to having it admitted as evidence of what was presented to the collector to show that there were such papers before the collector. I do object to it for any other purpose.

Mr. BEECHER: Do you concede that this is the certificate on which Deputy Collector Porter acted as deputy collector and admitted the defendant?

Mr. KOHLER: I will admit that. I admit that this is the certificate on which the deputy collector at Malone, on August 27, 1896, admitted the defendant Li Sing. I object to it on the further ground that it is incumbent upon the defendant to establish the fact that he is a merchant returning to the United States by the evidence required by section 2 of the act of 1893, which act is later than the earlier act and requires a different mode of proof.

Decision reserved.

Adjourned to Friday, February 11, 1897, at 11 a. m.

13 NEW YORK, *March* 8, 1897.

Present: Same counsel as before.

LI SING, the defendant, sworn and examined, through J. C. Thoms, interpreter, as follows:

By Mr. BEECHER:

Q. You are the prisoner?
A. Yes, sir.
Q. Were you formerly a resident of Newark, New Jersey, in the United States?
A. Yes, sir.
Q. What was your business there?

Objected to on the ground that by section 2 of the act of 1893 the facts in question as to the status of the defendant and business and residence in the United States and so on must be established by the testimony of two credible witnesses other than Chinese.

Decision reserved.

Counsel for Government excepts to this whole line of examination.

A. I was in the Chinese merchandise, keeping Chinese merchandise.
Q. What was the name of your firm?
A. Sam Palmer & Co.
Q. When did you leave or did you leave the United States in the summer of 1893 to go to China?
A. Yes, sir.
Q. Before leaving the United States did you procure this certificate (handing certificate to witness)?
A. Yes, sir.
Q. How soon after procuring that certificate did you leave the United States for China?
A. A week or two.

Counsel for defendant offers in evidence the certificate already marked for identification.

Objected to except for the purpose of showing what papers were before the collector; also that even on the assumption
14 that the present case is governed by section 6 of the act of 1884, the present certificate does not comply with that provision, inasmuch as it is a certificate issued by the Chinese consul at New York and vised at Hong Kong by the United States consul, and therefore does not purport to be a certificate issued by the Chinese government; on the further ground, that there is no evidence of any authority on the part of the Chinese consul to issue such certificates.

Paper admitted and marked Exhibit 1 for the purpose of showing what papers were before the collector upon which the defendant was admitted, and not as evidence of any of the facts stated in it.

Counsel for defendant excepts to the limitation and qualification of the commissioner's ruling.

Q. So that you left this country in the early summer of 1893 to go to China?

A. Yes, sir.

Q. For how long a time had you been a merchant in the city of Newark before you went to China in the summer of 1893?

This line of examination taken subject to objection of counsel for Government.

A. I was in that business for six years, but I only took an active part in the business for about a year and a half.

Q. What is the name of your firm?

A. Sam Palmer.

Q. And are any of your partners here in court?

A. Yes, sir; that is the man (indicating).

Counsel for Government objects and moves to strike out the statement that he is a member of that firm and a merchant on the further ground that it is required by the act of 1893, that the fact that the person is a merchant and does business in his own name must be established by the firm books themselves and cannot be established by oral testimony.

Motion granted. Exception.

Cross-examination by Mr. KOHLER:

Q. On what steamer did you go to China?

A. Empress of India.

Q. From what place did that steamer leave?

A. Vancouver.

Q. What was the exact date on which the steamer left; do you remember?

A. I don't know as to the exact date that the Empress of India left Vancouver.

Q. What was the month?

A. In June.

Q. What was your means of earning your livelihood during the last year before you left the United States?

A. When I sold my laundry I took active part in the business.

Q. When did you sell your laundry?

A. In 1891; about 1891.

Q. Do you mean to say that you have never worked in a laundry since then—hadn't been working in a laundry after 1891, and before you left the United States in 1893?

A. No, sir.

Q. Never worked in a laundry all that time?

A. No, sir.

Q. Do you know Mr. Philip A. Gifford?

A. Yes, sir; I knew him when I was keeping a laundry.

Q. Was he one of your customers?

A. Yes, when I kept a laundry he used to be one of my customers.

Q. Where did you live just before you left for China in 1893?
A. I had a room.
Q. Where?
A. On Ferry street.
Q. In what city?
A. Newark.
Q. Haven't you done any washing for Mr. Gifford since you are back from China?

Objected to as immaterial and irrelevant. Objection overruled. Exception.

16 A. No, sir.
Q. Are you married?
A. Yes, sir.
Q. When did you leave China to come to the United States the last time?
A. The fifth moon in the Chinese calendar. I presume that must have been June.
Q. Of what year?
A. Last year.
Q. How much did you earn from Sam Palmer's business during the last year in which you lived in the United States?
A. A little over $200, exclusive of my regular salary.
Q. What was your regular salary?
A. $30 a month.
Q. Didn't you get any money from any one else during that last year?
A. No, sir.
Q. Didn't Mr. Gifford pay you some money for washing his clothes during that year?
A. No, sir; he did not give me any.

Counsel for Government asks the commissioner to instruct the witness through the interpreter that it is a crime to swear falsely, &c.
The interpreter questions witness as to his understanding.

By the COMMISSIONER:

Q. Tell him he must tell the truth or otherwise he can be punished for perjury by imprisonment.
A. Yes, sir. He understands that.

By Mr. KOHLER:

Q. You repeat then that you did not receive any money from Mr. Gifford for washing his clothes the last year before you left for China?
A. No, sir.

SAM PALMER sworn and examined as a witness for defendant.

By Mr. BEECHER:

Q. Where do you live?

A. 64 Springfield avenue, Newark, New Jersey.

17 Q. What is your business?

A. My business is in the grocery and laundry supplies.

Q. Where is your place of business?

A. Newark, 64 Springfield avenue.

Q. Newark, New Jersey?

A. Newark, New Jersey.

Q. Do you know Li Sing?

A. Yes, sir.

Q. Do you know what his business was during the spring of 1892 and 1893?

A. Yes, sir.

Q. What was his business?

Objected to on the ground that the books are the best evidence, and on the further ground that the testimony of a Chinese witness is not competent for this purpose. Objection sustained. Exception.

Q. Was Li Sing a member of the firm of Sam Palmer and one of your partners during the years 1892 and 1893?

Same objection, ruling, and exception.

Adjourned to Monday, March 15, 1897, at 10.30 a. m.

NEW YORK, *June* 8, 1897.

Appearances.

Max J. Kohler, assistant United States attorney, for the Government.

William C. Beecher, for the defendant.

Testimony offered on behalf of the Government, without prejudice to the objection that the defendant has failed to establish as part of his own case his right to be and remain here.

It is stipulated by the respective counsel for the purposes of enabling the questions of law and fact in this case to be passed

18 upon, that the commissioner will permit the evidence offered by the defendant to go in subject to the Government's objections, and the objections are then to be passed upon at the end of the whole case. In so far as this is in conflict with rulings heretofore made herein the same are hereby rescinded.

Counsel for defendant states his intention of putting in further evidence on the next adjourned day, which will be regarded as having been put in before defendant's case is closed.

PHILIP A. GIFFORD sworn and examined as a witness for the Government.

By Mr. KOHLER:

Q. Where do you reside?
A. 40 Park place, Newark, N. J.
Q. What is your position?
A. Now, I am in the advertising business. I ceased to be deputy county clerk since I was here last January.
Q. Did you testify in the case of the United States against Li Fung?
A. Yes, sir.
Q. (Exhibit 1 shown witness.) Was this affidavit taken before you?
A. Yes, sir.
Q. Do you know the man whose picture is there shown?
A. Yes, sir.
Q. How long have you known him?
A. I think between six and eight years.
Q. And that is the man who appeared before you, is it?
A. Yes, sir.
Q. In what way have you known him?
A. I have seen him on a great many occasions in a laundry two doors below my house.
Q. What is the name on that laundry?
A. John Sing.
Q. Under what name have you known this man?
A. John Sing.
Q. Have you seen any of his laundry slips?
A. I don't know.
Q. Where is the place where you have seen this man?
A. I think it is 588 Broad street.
19 Q. Are you sure it is not 590 Broad street?
A. It is about there. I am not sure of the number. My house is 584 Broad street, and it is right near there.
Q. Has he ever done any washing for you?
A. I have had washing done at the place.
Q. Have you delivered the wash to him?
A. Yes.
Q. How many times have you seen him?
A. I don't know. During eight years it is very hard for me to say; a great many times. I think certainly twenty-five times.
Q. Have you paid him for the washing which he did for you?
A. Yes.
Q. Do you remember a period of a number of months when he was not to be seen at that place?
A. Yes.
Q. Was that after this affidavit was taken before you, which is dated the 7th of July, 1893?
A. Yes, sir.
Q. Have you seen him since that date?

A. Yes, sir.
Q. How often have you seen him since last August?
A. Maybe six or eight times.
Q. Have you taken your wash to his place since then?
A. Only once.
Q. Did you see him there at that time?
A. I am not clear about that, whether I saw him the last time that I took it there or not.
Q. Have you seen him about that place on these five or six occasions since his return?
A. I have seen him very seldom since his return.
Q. While he was away did you have your wash laundried at that place?
A. No, sir.
Q. What induced you bring your wash back to that place?

Objected to as immaterial, incompetent and irrelevant. Objection overruled. Exception by defendant.

A. I was not satisfied with my laundress, and I took it there only just on that one occasion.
Q. Did you know when you went there that this man was back from China?
A. Oh, yes; I knew it at that time. I had seen him.
Q. How long before that had you known it?
A. I don't know. A few weeks perhaps.
Q. Did you have any conversation with him?
A. Yes, sir; he called once at my office and once at my house.
Q. What was the conversation about?
—. He came alone once, and at another time with another Chinaman. The burden of his conversation was that I should be impressed with the idea that he was a merchant.

Counsel for defendant objects to the last sentence of the answer as a characterization which is not called for.
The last sentence of the answer is stricken out.

Q. Tell us what he said?
A. I cannot do it.
Q. State it in substance?
A. The other Chinaman that was with him did most of the talking. It was, didn't I know that he was a merchant?
Q. He asked you that?
A. That was the import of the question.
Q. Did the man that accompanied him ask him that in his presence?
A. I really cannot remember that.
Q. Did John Sing make any reference to the fact in his conversation with you that he had been in China?
A. No, sir.
Q. Did you make any remark about seeing him back, or ask him where he had been?

A. Oh, I suppose I did say that I was glad to see him back, as I had asked about him while he was away.

Q. Was this man John Sing, with the other Chinaman that you have referred to at your place since you testified here the last time?

A. Yes, sir.

21 Cross-examination by Mr. BEECHER:

Q. Do you remember what month it was that this interview took place that you speak of at your house?

A. It was during last winter.

Q. That was the last time that you saw him?

A. Once since that he was at my office, I think about two months ago.

Q. You do not recollect having seen him at this laundry, 588 or 590 Broad street, since his return from China?

A. I am not clear about that; no, sir.

Q. Can you at this lapse of time recall and state when it was that you saw him there last before he went to China?

A. I think he was away about two years, and before he went away he said something about going. Then I missed him, and I spoke to his friends, Chinamen that I had seen there, and asked: "When did you hear from John," or "When is John coming back"—something of that kind—and they said: "Next spring," or "next winter"—something of that sort.

Q. Did you know his brother, Li Sing?

A. Not to know him as his brother.

Q. Did you know that he had a brother whose name sounds very nearly the same?

A. No, sir; I did not know that.

Q. Did you know a Chinaman named Lee Gang?

A. No, sir.

Q. You did not know that he had bought out this laundry along in the early 90's?

A. No, sir. I have seen a number of Chinamen in there, but I wouldn't remember them to know them.

Q. You say that you first became acquainted with him some six or eight years ago?

A. I think so.

Q. And, of course, you have no recollection in regard to the different times when you were there prior to 1893?

A. Sometimes I would go in, but generally, I think the girl would take the things in.

Q. So that you would not know who received the wash?

A. No, sir; only I know that on a number of occasions he received it.

22 Q. I only want to know whether you can tell after this lapse of time how often you yourself went into this laundry prior to 1893, and at what times you went in?

A. I think it was about Christmas week of 1892 that we sold our house and moved down on Park place about a quarter of a mile, and then I changed my laundry.

Q. Then since Christmas, 1892, you probably have not been there yourself at all?

A. No, sir.

Q. Prior to that, between 1888 and 1892, could you tell at what dates you went into this laundry?

A. No, sir. Often I went in and chatted with him, talked and laughed, when I had no particular business.

Q. But you have no recollection of the particular times when that occurred?

A. No, sir.

Q. You speak of his having called with some other Chinamen to see you at your house when there was some conversation in respect to his being a merchant?

A. Yes.

Q. And you say that you do not recall the form of the questions put to you. Was it not to see whether you knew the fact of his being a merchant and a partner in the firm of Sam Palmer & Company?

A. Yes, sir; but I cannot tell you what particular time that was mentioned. Two or three times my attention was drawn to the fact that he was a member of the firm of Sam Palmer & Company, but I also said that I did not know it.

Q. Were not the questions as to whether you knew anything about his being a member of that firm?

A. Yes, I think so.

By Mr. KOHLER:

Q. Who was the Chinaman that was with John Sing?

A. I don't know.

Q. Do you know Sam Palmer by sight?

A. Oh, yes.

Q. Sam Palmer is a Chinaman, too, isn't he?

A. Yes, sir.

23 RICHARD J. CROWLEY sworn and examined as a witness for the Government.

By Mr. KOHLER:

Q. Where do you live?

A. Newark, N. J.

Q. What is your business?

A. Plumbing, and paints and oils, &c.

Q. Do you know the defendant Li Sing?

A. Yes, sir.

Q. Is this the man (showing photograph on Exhibit 1 to witness)?

A. Yes, sir; I know him as John Sing.

Q. Where have you seen him?

A. In Newark, at the laundry, 590 Broad street.

Q. Have you seen any other Chinaman there?

A. Yes, sir.

Q. How often have you seen this man there?

A. Before he went to China I saw him there every day.
Q. For how long a period?
A. Six or seven years.
Q. Have you seen him since he returned from China?
A. Yes, sir.
Q. How often?
A. About a dozen times.
Q. What brought you to the laundry?
A. Business.
Q. Did he ever do any washing for you?
A. No, sir.
Q. Have you seen him receive clothing to be washed?
A. Yes, sir.
Q. How often?
A. When I have gone in there.
Q. Since his return from China have you seen persons bring any wash there?
A. Yes, sir; I have.
Q. Have you seen him receive any wash?
A. I could not say that I saw him receive it.
Q. Have you seen him handle any money there?
A. No, sir. I have seen him washing and ironing there.
Q. Tell us what particularly brought you there since his return from China?
24 A. My business necessitated me to go there as a plumber to see about some pipe.
Q. Who paid you?
A. The bill was made out to John Sing, and I took it down there, and he paid it himself.
Q. How long ago was that?
A. Some time since he came home. I cannot really remember.
Q. In the fall, summer or winter?
A. It was in the fall of the year.
Q. Have you seen any of these advertisements there at the laundry (showing a green-colored circular to the witness)?
A. No, sir; I never saw those.
Q. Have you seen any of this color (showing a pink-colored one to the witness)?
A. I have seen these, but the inspector had them. I never saw these in the place.
Q. Have you seen any placards in the place tacked upon the wall?
A. Yes; some that I could not understand.
Q. Did you see any sign over the door?
A. Yes.
Q. Since this man's return from China?
A. Yes, sir. It was there before he went, and it is there yet. It is, "John Sing laundry."
Q. Has the defendant been to see you since he was arrested?
A. I don't think he was arrested at the time. He came to see me since he has been home.

Q. How long ago was it?
A. Shortly after the inspector had seen me in Newark.
Q. What did he say to you?
A. He had another young fellow with him—an interpreter, I think.
Q. A Chinaman?
A. Yes, sir.
Q. What did he say to you?
A. He wanted to know if I knew that he was in the merchant business in Newark, connected with a firm on Springfield avenue.
Q. What did you say?
A. I said no. He wanted me to swear to it, and go as a witness for him that I knew him to be a merchant in the city of Newark.
25 Q. Who wanted you?
A. John Sing himself.
Q. What did you say?
A. I said no, I could not do such a thing. Then there was some conversation between him and the interpreter, and the interpreter asked me if I would not sign a paper as a witness for John Sing, to prove that he was a merchant in Newark.
Q. Was anything offered to you?
A. Yes. He said I would be paid well for my services.
Q. Who was the interpreter?
A. I don't know him.
Q. Had you ever seen him before?
A. No, sir. I have seen him once down in the laundry. I was passing the laundry and he called me, and I went in, and I guess there was 30 or 40 Chinamen in there at the time.
Q. Who do you mean by the marshal?
—. Mr. Scharf.
Q. Was that after the first occasion that you saw Mr. Scharf, or before?
A. Afterwards.
Q. Can you give us any idea about when it was?
A. It was three or four months ago, I guess.

Cross-examination by Mr. BEECHER:

Q. Are you not able to recall more accurately the time when so remarkable an occurrence took place?
A. No, sir; but I think it was in January.
Q. January, 1897?
A. Yes, sir.
Q. It struck you as rather an unusual thing, didn't it?
A. Yes, sir; it did.
Q. Didn't it make an impression on your mind?
A. Yes, sir.
Q. When did you first speak of it to any Government official?
A. Not until I saw Mr. Scharf.
Q. And that was very shortly afterwards, wasn't it?

A. Yes, sir.
Q. Within a few days?
A. It was before this occurrence that I spoke to Mr. Scharf. He didn't know anything about it at the time.
Q. I ask you: When did you first speak to any Government official in regard to this occurrence?
A. Not until I came here.
26 Q. When was it that you saw Mr. Scharf first in regard to Li Sing?
A. I really do not know.
Q. Was it in the fall, or winter, or spring?
A. It was around last January.
Q. How long before the occurrence that you have spoken of?
A. It was after.
Q. You saw Scharf first after that?
A. I saw Mr. Scharf before this occurrence happened in the laundry.
Q. How many days before?
A. Two or three days.
Q. Can't you fix the month when you saw Mr. Scharf first?
A. It was in January.
Q. You are certain it was in January?
A. Well, I cannot swear to it.
Q. When did you see Mr. Scharf first?
A. I am not positive, but I think it was in January.
Q. You had an interview with Mr. Scharf, and then a few days after that you saw these Chinamen?
A. Yes, sir. They came to my place of business first.
Q. And then did you see Mr. Scharf again after that?
A. No.
Q. When did you see Mr. Scharf again?
A. I have only seen him once until I met him here.
Q. Did you tell Mr. Scharf anything in regard to this case in January?
A. Only that I knew the party and knew him to carry on the laundry.
Q. And then you say you saw Li Sing again at this laundry after the time he called at your office?
A. Yes, sir.
Q. How long was that after this time that he came to your office?
A. Well, that same day.
Q. You went down to the laundry the same day?
A. I passed there and Sing called me in.
Q. Didn't he call at your house in the evening?
A. No, sir.
Q. What time was this?
A. It was about 10 o'clock in the forenoon.
27 Q. And about what time in the day were you down at the laundry?

A. I had occasion to pass there about 2 o'clock, and they called me in.

Q. You cannot give us the day of the month?

A. No, sir.

Q. Did you not make a note or memorandum of such a singular offer as this?

A. No, sir.

Q. It was an unusual occurrence to you?

A. Well, it appeared to be.

Q. Do you mean to say that there is any doubt about its being an unusual occurrence to you?

A. No, I do not.

Q. Then didn't it make a sufficient impression on your mind for you to be able to fix the time when it occurred?

A. I cannot say anything further than I have said about it.

Q. You have no idea as to what part of the month it was, and you are not certain as to the month?

A. I am quite positive it was in January.

Q. The early or latter part of January?

A. That I cannot say.

Q. You cannot fix it any more accurately than you have?

A. I fix it in January, I think.

Q. What business do you say you are in?

A. Plumbing.

Q. With whom?

A. With my father.

Q. What is the name of your firm?

A. R. J. O. Crowley.

Q. And where?

A. 552 Broad street, Newark, N. J.

Redirect examination by Mr. KOHLER:

Q. At the time you say Mr. Scharf first came to see you, a few days before this conversation with Li Sing, did he show you this paper and this picture (showing Exhibit 1 to the witness)?

A. Yes, sir; he did.

Q. And he asked you if you knew that man, did he?

A. Yes, sir; that was the first thing he said to me.

28 JOHN D. WOOD sworn and examined as a witness for the Government.

By Mr. KOHLER:

Q. Where do you reside?

A. 512 Central avenue, Newark, N. J.

Q. What is your position?

A. I am a police officer, detailed on Broad street.

Q. Does your beat cover 560 Broad street?

A. Yes, sir.

Q. Do you know this man (showing picture on Exhibit 1 to witness)?

A. Yes, sir.

Q. Who is it?

A. It is John Sing. I always knew him as such.

Q. Where have you seen him?

A. In his laundry.

Q. Where is that?

A. I should judge it is about 585 to 590 Broad street, somewhere along there—nearly opposite Central avenue.

Q. How long has your beat covered that place.?

A. I have been detailed there since a year ago last March for day duty.

Q. Did you know this man whom you identify as John Sing before he went to China?

A. I have known him 16 or 17 years—ever since the time I used to have a night post there.

Q. Do you remember the time he was away in China?

A. Yes, sir.

Q. And when he came back?

A. Yes, sir; about when he came back.

Q. How often have you seen him since he came back from China?

A. I could not tell you that. I have seen him some days probably two or three times, and other days I may not have seen him at all.

Q. Just give us an estimate of about how often?

A. I could not give any estimate on that, only when I passed the laundry I would see him there ironing.

Q. Have you seen him a dozen times?

A. Yes, more than that.

Q. Have you ever been in his place?

29 A. No, I have never been in his place much since I saw the marshal, Mr. Scharf. I went there quite frequently after that to see if he was there, but he was not there after that.

Q. Before that occasion had you seen him in the place?

A. Yes, sir; I had seen him by the window ironing as I passed by.

Q. How often since last August?

A. I have not seen him at all since that gentleman (Mr. Scharf) came to see me.

Q. Between those times?

A. I could not say.

Q. How many times have you seen him ironing?

A. I could say two dozen, safely enough.

Q. That is, since he came back from China?

A. Yes, sir.

Q. When Mr. Scharf, the Chinese inspector, came to see you, did he show you this paper (Exhibit 1 shown witness)?

A. Yes, sir; and asked me if I knew the man.

Q. How long ago was that?

A. In January some time. I could not tell you the date. When

I saw the marshal he asked me if I would mind coming here. I said if I was subpœnaed, I would certainly come over. I never tried to fix my mind particularly on the date.

Q. Have you seen any sign there?

A. There is a sign on the window now, "John Sing."

Q. Have you seen any of these advertisements there (showing green and pink placards to the witness)?

A. The marshal had them.

Q. You have not seen any of them in the laundry?

A. There is painting or something of that kind in Chinese upon the walls, that I have seen there as I have been passing the place.

Cross-examination by Mr. BEECHER:

Q. You say you saw Mr. Scharf some time in January?

A. Yes, sir.

Q. The early part of the month?

A. Yes, sir; or the middle of the month.

30 Q. You have never seen this Chinaman since that time?

A. No, sir. I went there several times especially to see if he was there.

Q. You have never been in the place and seen him there, have you?

A. No, sir; I have never had no particular call to go in the place. I would speak to them in the door as I was passing and say, "How are you, John?" just pass the time of day with them.

Q. The time you speak of having seen him since he came back from China, you saw him through the window?

A. Yes, sir; and he would always recognize me by a bow.

Q. When you spoke to him or to the man that was in there as you passed by, the man would nod back?

A. Yes, sir.

Q. But you have never been inside?

A. No, sir.

Q. Where was it that you saw the man at work?

A. Broad street runs that way (indicating), and his laundry is on the left-hand side as you go down, that is, going south, and he worked right by the window.

Q. Was there a laundry bench or table right in front of the window?

A. One of them is there and the other is alongside of the wall.

Q. The one where you have seen him at work is right by the window?

A. Yes, sir.

Q. When do you recall having seen him last?

A. It was within a day or two of the time that I saw this gentleman (pointing to Inspector Scharf). I didn't know whether he was a United States marshal or a commissioner, or what he was.

Q. When did he come back from China?

A. Well, I could not fix the time. I should say around July or August.

Q. Did you see him there in midsummer?

A. I think it was around August. He was not there the first part of the summer.

Q. You are sure that you did not see him there in June?

A. No, I don't think he was there in June.

31 Q. Do you recall whether you saw him there in July?

A. I wouldn't be positive about June or July, but he was there in August, I know.

Q. That you are sure of?

A. Yes, sir; and in September and October, I think. I wouldn't fix any particular time that I have seen him there. I know he was away a good while.

Q. Six months?

A. Yes; it was a year and six months, I should judge, from the time I first heard that he was away. You see, I was only on beat there a year regularly, and I know I used to see him there previous to that time when I was there before, and he was away in China twice, I heard.

Q. How many men were there working in the laundry there?

A. Three or four, I guess.

Q. Do you know the other men?

A. No; nothing more than I see men in there.

Q. You know the man that is there now?

A. Yes; but I don't know his name.

Q. You have seen him there all the spring and you recognized him as the man that you had seen there by face?

A. I think the same man that is there now was there when John was there the last I saw him.

Q. The man that is there now has been there for a considerable time, and all the time that John was away?

A. I could not refer to all the time.

Q. You were there on night duty?

A. I haven't been there at night in 12 years.

Q. Didn't you state a few moments ago that you knew him when you were there 12 years ago?

A. Yes, sir.

Q. Then your previous knowledge of the man was at least 12 years ago. Is that it?

A. Previous to this affair, yes. Before he went to China I used to see him every day.

Q. You have been by his place there and have seen men there a great many times prior to John's going to China?

A. Yes, sir.

32 Q. Haven't you also seen there the man who is now working there at times when you went by that place prior to Sing's going to China?

A. I don't know just when Sing went to China this last time.

Q. You know when he came back?

A. I know about when he came back.

Q. I ask you whether you have seen the man who is there now during the period when you understood Sing was in China?

A. I don't know.

Q. Have you no recollection of having seen the man who is now apparently in charge during the time when you understood Li Sing was in China?

A. I think, to the best of my knowledge, that the same man was there before John came back from China.

Q. And for several years before?

A. No, I would not say that.

Q. You were by there frequently?

A. Yes, sir.

Q. Both during the time when you thought he was in China and for a long time prior thereto?

A. Yes, sir; but I did not always look in those windows particularly. I pass this place quite frequently, and I don't know who is in the lobby downstairs when I pass it.

Q. You have only looked in there particularly since you have seen Mr. Scharf?

A. Yes, sir.

Q. You have been more particular since that time. Is that it?

A. Yes, I have been more particular since that time to see whether he was there or not.

Q. What precinct are you connected with?

A. The second precinct.

Q. You have been connected with that precinct how long?

A. It is two years now since I have been back there.

Redirect examination by Mr. KOHLER:

Q. Do you remember the day when you saw Inspector Scharf?

A. No, sir.

Q. Do you remember seeing him coming out of Li Sing's place?

A. Yes, sir; I saw him come out of the place.

Q. Did you notice any Chinamen around there at that time?

33 A. Not in particular until after he came out and went to talking to me, and went down the street.

Q. What did you see then?

A. I saw Chinamen there in civilians' dress, and one of them called the rest and pointed to this man as he went down the street, on the other side of Broad street.

Q. Did you see Li Sing there at that time?

A. He was not there—that is, John Sing, you mean?

Q. Yes; John Sing.

A. No, sir; he was not there at that time.

J. THOMAS SCHARF sworn and examined as a witness for the Government:

By Mr. KOHLER:

Q. What is your position?

A. I am Chinese inspector of the port of New York.

Q. Did you ever see this paper, Exhibit 1, before?
A. Yes.
Q. Do you remember about when you first saw it?
A. I obtained it in one of the Chinese cases about September or October last. I arrested a Chinaman that entered on September 9th, I think it was, and these papers all come out afterwards on his trial.
Q. Did you take that paper over to Newark with you on any occasion?
A. Yes, sir.
Q. When?
A. The 15th of January last. The case was coming up on the 20th of the month and you sent me over to get witnesses, and I took this paper along, this being Li Sing's case and we wanted witnesses in his case and I went over there to hunt for them.
Q. Did you go to 590 Broad street?
A. Yes, sir.
Q. Did you see the defendant there?
A. It is a laundry on the level of the street, with a door and one window, and it has a sort of light-box above the door painted in red letters, "Li Sing, laundry." I went in the laundry and I saw two Chinamen at work there. I talked with them about laundry
34 work first, pretending that I was coming there to get laundry work done, and I asked him if he had a list of prices, and he said——

Objected to.

Q. (Paper shown witness.) Did you get this there?
A. I obtained this list of prices in the place. They were tacked up against the wall.

Counsel for the Government offers in evidence the paper referred to.
Objected to on the ground that there is no proof that the papers were obtained from the defendant, nor is it shown that they belonged to the defendant or were obtained from his laundry. Objection overruled. Exception by defendant.
Marked Government Exhibit 2.

Q. Did you see the defendant in there?
A. No, sir.
Q. What was being done in the place?

Objected to as immaterial, irrelevant and incompetent in the absence of the defendant. Objection overruled. Exception by defendant.

A. They were washing and ironing clothes when I was there.
Q. You saw various of the other witnesses on that day, did you not?
A. Yes, sir. I went outside, and the first man I met was a colored man, who lived next door, and then I met this police officer on the corner, and I showed him this paper.

Q. And you saw Mr. Crowley also?
A. Yes, sir; I saw Mr. Crowley down the street.
Q. That is all you know of your own knowledge?
A. That is all.
Q. You have seen the defendant here in the other case?
A. Oh, yes, I know him.

No cross-examination.
(Government rests.)

Adjourned to Tuesday, June 15, 1897, at 10.30 a. m.

35 NEW YORK, *June 15th*, 1897.

Appearances.

Max J. Kohler, ass't U. S. att'y, for the Government.
F. W. Fielding (representing Mr. Beecher) for the defendant.

GUS SHAFER sworn and examined as a witness for the defendant.

By Mr. FIELDING:

Q. Where do you live?
A. 34 South Orange avenue, Newark, N. J.
Q. What is your business?
A. Truck-driver for Lang & Company, flour merchants in Newark.
Q. Do you know the defendant Li Sing?
A. Yes, sir.
Q. How long have you known him?
A. About two years—between 1891 and 1893.
Q. Where did you first get acquainted with him?
A. I bought stuff off of him over the counter.
Q. Where?
A. 55 South Orange avenue; Sam Palmer & Company was the name of the place.
Q. And that was in what year?
A. During 1891 and 1893.
Q. During that time did you have occasion to go to his store frequently?
A. Yes, sir.
Q. And when there did you see the defendant Li Sing?
A. Yes, sir; I have bought tobacco of him.
Q. What did you see him doing?
A. At different times I saw him fixing up boxes and so on—soap, starch and such as that, and selling goods over the counter.
Q. And taking in money?
A. Yes, sir.
Q. When did you miss him from there?
A. About the first part of the spring, 1893.

36 Cross-examination by Mr. KOHLER:

Q. How did you happen to come here today?
A. I was subpœnaed.
Q. Had you spoken to any one about this case?
A. No, sir.
Q. You don't know how you happened to be subpœnaed?
A. No, sir; I don't know the first thing about it.
Q. Do you know Mr. Beecher?
A. No, sir.
Q. Do you know Sam Palmer?
A. Yes, sir; when he gave me the subpœna he said it was about his partner.
Q. Have you the subpœna here?
A. Yes, sir (witness produces paper).
Q. How long have you known Sam Palmer?
A. 11 or 12 years.
Q. Do you see the defendant Li Sing here?
A. Yes, sir; that is him (indicating defendant).
Q. You are sure that you have seen tobacco on sale in Sam Palmer's place, are you?
A. Yes, sir.
Q. How do you happen to remember that it was between 1891 and 1893?
A. Because I was carting goods from the boat to Sam Palmer's place.
Q. But how do you remember that it was those particular years, and not between 1893 and 1894?
A. Because a different firm went out of partnership about that time.
Q. Did you stop buying tobacco then?
A. No, sir. I have bought tobacco off of Sam Palmer whenever I am in the neig-borhood.
Q. How old are you?
A. 46.
Q. Do you know any other Chinamen?
A. If I go by the place and see them, I would say "Hello John."
Q. How often have you seen this man?
A. I couldn't say.
Q. More than once?
A. Yes; many times.
Q. When you were in this place did you buy tobacco from this man every time?
A. No, sir.

Q. Did you ever see this man in any other place?
37 A. I have met him in Market street and in Springfield avenue, and different places.
Q. Where was Sam's place when you were there and saw this defendant?
A. 55 South Orange avenue.
Q. Is that the place where he is now?

A. No, sir.
Q. You did not speak to any one about this case until Sam Palmer gave you a subpœna?
A. Yes, sir.
Q. Did you know what you were to testify to here?
A. I couldn't say.
Q. No one had spoken to you at all about Li Sing before you were subpœnaed?
A. That is all I know.

By Commissioner SHIELDS:

Q. Did you know this Chinaman's name when you saw him in that store?
A. I always called him John.

By Mr. KOHLER:

Q. What time of the day did you go there to get tobacco?
A. It was somewhere from about 5 o'clock in the afternoon until eight in the evening.
Q. Has anything been promised to you for testifying here?
A. No, sir.
Q. And you have not received anything?
A. I received twenty cents car fare.

FREDERICK H. ANDERSON sworn and examined as a witness for defendant:

By Mr. FIELDING:

Q. Where do you live?
A. 37 Springfield avenue, Newark.
Q. What is your business?
A. Furniture-mover.
Q. Do you know Li Sing?
A. I have seen him before.
Q. Is that him (pointing to the defendant)?
A. Yes, sir.
38 Q. Where did you first see him?
A. In Broad street, Newark. I used to take my laundry work there to him.
Q. What did you see him doing there?
A. He was behind the little counter that they have in all laundries, and I gave him my wash and he gave me a check for it.
Q. What year was that?
A. 1889 and 1890.
Q. Have you seen him after that?
A. Yes, sir; at 55 South Orange avenue, Newark.
Q. What business is carried on there?
A. Well, it is like a grocery store; they sell different things, tobacco, and so on—Sam Palmer & Company is the name of the place.

Q. You say you have been in that store and seen this defendant there?
A. Yes, sir.
Q. What was he doing there?
A. He was behind the counter waiting on customers.
Q. How often did you see him there?
A. Whenever I was up that way I used to go in there and get my tobacco.
Q. Were you in there frequently?
A. I can't tell you how often; a dozen times, or twenty times maybe.
Q. At all times when you have been in there has the defendant been attending to the same duties?
A. There has been times when Sam Palmer himself has waited on me.
Q. During what period was it that you saw the defendant at his place in 55 South Orange avenue?
A. It was between 1892 and 1893 some time.
Q. Did you ever have any conversation with Li Sing in reference to the defendant's connection with the concern?
A. No.
Q. Did you ever have any such conversation with Sam Palmer?
A. I have talked with Sam Palmer, and Sam Palmer said he was his partner——

Objected to. Objection sustained and last part of the answer stricken out.

No cross-examination.

39 *Further Testimony on Behalf of the United States.*

FRANK SPAETH sworn and examined as a witness for the Government.

By Mr. KOHLER:

Q. Where do you live?
A. 132 Jackson street, Newark.
Q. What is your business?
A. I drive a bakery wagon.
Q. Do you know the defendant Li Sing?
A. I don't know him under that name; I knew him as John Sing.
Q. Where have you seen him?
A. In a laundry on Broad street.
Q. What have you seen him doing there?
A. Washing and ironing and taking in laundry work there.
Q. How did you happen to go in there?
A. I used to live right in Front street and that was the nearest laundry for me.
Q. How recently have you seen the defendant there?
A. I couldn't say. It was after the inspector here was over there.

Q. Have you seen him there since January?
A. Yes, sir.
Q. How often have you seen him in that laundry since the first of September last?
A. Only once. My sister has taken the laundry work there since then.
Q. Did you have any dealings with Li Sing himself?
A. Yes, sir; I handed him the check and he gave me my wash and I paid him.
Q. What is the name of that place?
A. John Sing, laundry.
Q. Is the sign in English?
A. Yes, sir.
Q. How does it read?
A. "John Sing, laundry."
40 Q. You are sure it is Sing, and not Zing?
A. Yes, sir; Sing.
Q. Was there any period during which you were in this laundry prior to last September and did not see this man?
A. Yes, sir.
Q. Were you told that he had gone to China?
A. Yes, sir.
Q. When was that?
—. I don't remember. I was away to the seashore, and when I came home I asked where he was, and they said he went to China.
Q. Before you were told that he had gone to China you had been in that place and had seen him there?
A. Yes, sir.
Q. How often?
A. He used to be there all the time. He was right there where the Pettie Memorial church is before he got the stand where he is now.

Cross-examination by Mr. FIELDING:

Q. Where did they do the washing?
A. In the back room. You can see right in there from the front.
Q. Isn't it dark in there?
A. Not very.
Q. Could you distinguish the figure of a man in there?
A. Yes, sir.
Q. During what year was it that you say you saw this defendant in there washing?
A. I didn't say I saw him there washing; I said working. I have seen him there in different years; I couldn't say what year.
Q. When was it that you saw him the last time in this laundry prior to the time when you were told he had gone to China?
A. I don't know what year he went to China. I have seen him in there since January.
Q. Do you remember about how many years ago it was? You see, it is very important for you to try to remember this.

A. I never took no interest in this. I have never taken
41 laundry work to any other place since I can remember, and this place has always been run under the name of John Sing

Q. There was a long period prior to the time when you were told he had gone to China that you did not see this defendant there?

A. Well, not so very long. I was away in the summer, and when I came back I inquired where John was.

By the COMMISSIONER:

Q How long ago was that—two or three years ago?

A. I can't say; I think it is more than that.

By Mr. FIELDING:

Q. Was it prior to 1891?

A. I think that is when he went away—somewhere around there.

Q. And after you had come back from your summer vacation you did not see him there?

A. I won't say that. I did not see him there when I came back.

Q. And you did not see him until January of this year?

A. Some time in January or after January.

Q. During all that period from the fall of 1891 until January of this year, you did not see him at that laundry?

A. No.

Q. Have you ever been to the place kept by Sam Palmer & Company?

A. No, sir.

Q. So you do not know whether this defendant was there or not during any of that time?

A. No, sir.

Q. Do you know whether the business of John Sing's laundry changed hands at any time?

A. The name was never taken down.

Q. Do you know anything about the way Chinamen conduct business?

A. No, sir.

Q. Did you ever know them to remove signs or change signs on Chinese laundries?

A. I never took no notice of that. The price-list, I know, is the same—John Sing.

Q. That sign had been there how many years?

A. I cannot say.

42 Q. From the time you first took laundry work there?

A. He is in a different store now.

Q. But that sign has been up ever since the laundry has been there?

A. Well, I guess it has.

Redirect examination by Mr. KOHLER:

Q. You do not recollect distinctly when it was that you were told that this man had gone to China?

A. No, sir.

Q. But you think it was in 1891?
A. Somewhere around there.
Q. Are you sure it was not 1893?
A. I won't say. It might be that.
Q. Is there anything that makes you more certain it was 1891 instead of 1893?
A. No, sir.
Q. When you said before that you thought it was in that period, you were referring to the time when you were told he went to China?
A. Yes, sir.
Q. How long before was it that you were told he went to China?
A. About four months.

GEORGE W. SCHENCK sworn and examined as a witness for the Government.

By Mr. KOHLER:

Q. Where do you live?
A. 588 Broad street, Newark.
Q. What is your business?
A. Janitor at 588 Broad street.
Q. Do you know what the business is that is carried on at 590 Broad street?
A. Yes, sir; it is a laundry.
Q. What is the sign that is up there?
A. John Sing laundry.
Q. Have you ever seen this defendant in that place?
A. Yes, sir.
Q. When last?
A. I have not seen him there since January, I guess, or the first of February.
Q. But you did see him there in January?
A. Yes, sir.
43 Q. Have you seen him there since you saw Inspector Scharf?
A. No, I don't think I have. I saw him there just before, though.
Q. How long ago was it that you saw Inspector Scharf?
A. About the middle of January.
Q. How long before that had you seen this defendant?
A. I have seen him since he came back.
Q. When did he come back?
A. In August last, I think.
Q. Have you seen him in the laundry?
A. Yes, sir.
Q. What was he doing?
A. I saw him ironing the last time.
Q. How often have you seen him ironing in there since he came back?
A. I haven't seen him very often since he came back.

Q. Well, about how often?
A. I don't remember seeing him more than once or twice—once, I know.
Q. And you are sure this is the man (pointing to defendant)?
A. Yes, sir; John Sing.
Q. Well, is this the man that you speak of as John Sing?
A. Yes, sir; that is the man.

Cross-examination by Mr. FIELDING:

Q. Have you any doubt about that in your mind?
A. That is the man that goes by the name of John Sing.
Q. You have no difficulty in telling the difference between Chinamen?
A. Not him; I have seen him too often.
Q. Isn't there a possibility that you are mistaking him for some relative of his?
A. No, sir.

By the COMMISSIONER:

Q. Have you any doubt in your mind that this is the man?
A. No, sir.
Q. You saw him after he came back from China?
A. Yes, sir; and I saw his trunk or boxes when he came back.

44 By Mr. FIELDING:

Q. When did he come back?
A. In August of last year.
Q. When did he go to China?
A. In 1893, I think.

By Mr. KOHLER:

Q. You said something about seeing this man's trunk.
A. Yes, sir. They came there a day ahead of him, I think.
Q. And were the trunks taken into that place?
A. Yes, sir.
Q. And the next day you saw him there?
A. Yes, sir.

By Mr. FIELDING:

Q. How do you know they were his trunks?
A. Well, I was told they were.
Q. Who told you they were his trunks?
A. Well, different ones; they said John is coming back.
Q. Who said that?
A. I cannot name them.
Q. Did they say they were this defendant's trunks, or that they were simply John's trunks?
A. John Sing's trunks.
Q. Is not the name "John Sing" the name of the laundry?
A. No, sir; it is the name of the man that runs it.

Q. Do you know of your own knowledge that the name on the outside of the laundry is the name of an individual or the name of the business?

Objected to on the ground that the witness has not qualified as an expert. Objection sustained.

Q. That is all you can say about these trunks being the property of this defendant—that somebody told you they were the trunks of John Sing?

A. Yes, sir.

By the COMMISSIONER:

Q. And the next day you saw John there?

A. Yes, sir.

45 By Mr. FIELDING:

Q. Did you see anybody else come there the next day—any other Chinaman?

A. I didn't notice anybody else but him.

Q. But there might have been somebody else there?

A. Yes, sir; but this (pointing to defendant) is the man I am talking about.

Q. And you had not seen this man for several months before these trunks arrived there, and you did see him the day after?

A. Yes, sir.

Adjourned until 3 o'clock p. m.

Reconvened at 3 p. m.

Present: Mr. Kohler, for Government; Mr. Beecher, for defendant.

LI SING, the defendant, recalled.

Witness testifies through interpreter, Dr. Thoms.

By Mr. BEECHER:

Q. Do you know a man named Richard J. Crowley?

A. No, sir.

Q. Mr. Crowley says he has a place of business as a plumber at 552 Broad street, Newark. Do you remember ever seeing him or having any talk with him?

A. No, sir.

Q. Mr. Crowley says that you called upon him in January with another Chinaman and offered him money if he would testify that you were a merchant. Is that true?

A. No, sir.

Q. Did you ever offer any one any money to testify in your behalf that you were a merchant?

A. No, sir.

Q. Do you know a police officer on the Newark police force by the name of John D. Wood?

A. No, sir.

46 Q. What was the name of the laundry which you formerly owned on Broad street?

A. John Sing.

Q. And when you sold your laundry out, as you have already testified, was the name retained by the purchaser, John Sing?

A. Yes, sir.

Q. When laundries are sold by the laundrymen the purchaser retains the old name?

Objected to. Objection sustained.

Q. While you were engaged in the laundries prior to 1891, do you know whether your American customers coming in called you by the name of John Sing or not?

A. Yes.

Q. Had you heard the other laundryman in the laundry called John Sing?

Objected to as incompetent and immaterial. Objection sustained. Exception.

Defendant's counsel states that he offers to prove by this line of testimony that the term John Sing was not the name of this defendant, was only the name of the laundry and was applied indifferently to any or all of the occupants in the laundry by customers.

Counsel for Government does not acquiesce in any general offer to prove anything of that kind, and will object to particular questions which are asked as being incompetent.

Q. Have you heard any other Chinamen in this laundry referred to herein called by the name of John Sing?

A. Yes.

Q. How many other Chinamen have you heard called John Sing in that laundry? Tell the names of the Chinamen who you have heard called by that name, John Sing?

A. Li Sing is one; his brother.

Q. What is your brother's name?

A. Li Sing.

Q. What is your name?

A. Li Sing.

Q. Write first your name and then your brother's name.

Witness writes two names in Chinese on a piece of paper.

47 Q. Which is your name and which is your brother's?

A. The first one is his name and the second one his brother's.

Counsel for defendant offers the paper in evidence.

Marked Exhibit 7, the numbers 1 and 2 on the exhibit referring to the name of the defendant and that of his brother respectively, both of which would be spelt in English Li Sing.

Q. Can you give me the translation of the name Li Sing, which is the name of the defendant?

The INTERPRETER: Li is the surname of the family. Sing means he completion of anything or anything that has been done or fixed. 'hat is the defendant's name. The other one means anything that s prosperous, advantageous.

Mr. BEECHER: So that although the names are pronounced the ame there is a difference?

The INTERPRETER: They are pronounced the same, yes, but an ntirely different meaning.

Mr. BEECHER: In Chinese they have a character for each ord?

The INTERPRETER: Yes; a character for each word.

Q. Where is your brother now?
A. He has gone back to China.
Q. When?
A. Last year.
Q. 1896?
A. Yes, sir.
Q. You were acquainted with Philip A. Gifford?
A. Yes, sir.
Q. But you do not know the man Richard J. Crowley or John D. Wood?
A. No, sir.
Q. Do you know a colored man named George W. Shenck, who ived at 588 Broad street?
A. Yes.
Q. How long have you known him?
A. I knew him for several years—five or six years before he went way.
Q. Have you met him since he came back?
A. Yes; I met him once in my brother's place.
Q. He says that he has seen you working in a laundry 8 there. Is it true that you have been working in that laundry since you came back from China?
A. No, sir; I have only visited my brother.
Q. Have you worked in that laundry since you sold it to your rother in 1891?

Objected to on the ground that it cannot be shown, except by the stimony of credible white witnesses.
Decision reserved.

Cross-examination by Mr. KOHLER:

Q. Was your brother present at the time you had this conversa- on with George W. Shenck since you are back from China?
A. Yes.
Q. How long ago was that conversation?
A. Soon after I had returned from China.
Q. When was it that your brother went to China?
A. About the tenth Chinese moon.
Q. When is that?
A. About November.

JOSEPH C. THOMS sworn and examined as a witness for defendant.

By Mr. BEECHER:

Q. You have translated the two names of Li Sing and Li Sing that appear on Exhibit 7, have — not?
A. Yes, sir.
Q. And the translation which you have given is *is* as near as you can convert into English the two Chinese names referred to?
A. Yes, sir.

Cross-examination by Mr. KOHLER:

Q. Are those two names pronounced in the same way in Chinese?
A. Yes.
Q. In the same way?
A. The same way; yes.
Q. They are absolutely alike?
A. I would not say they are absolutely alike. The Chinese dialects are different in different localities, but in my locality, which is the same as this man's—that is, we are about fifty miles distant—they are pronounced the same way.
49 Q. Do you know this man's dialect?
A. Yes.
Q. You want to tell the commissioner then that these two names, which are written out and look differently, are pronounced in the dialect the same way in Chinese?
A. Yes, sir.
Q. So two persons, brothers in one family will have the names which are pronounced the same in Chinese, too?
A. It appears so.
Q. I am merely asking you?
A. Yes.

Redirect examination by Mr. BEECHER:

Q. Is there a difference in the inflection of the two words?
A. You might say this is a Sing and the other Sing. No. 1 we say Sing; No. 2 is Sing. I know the difference.
Q. Is there a difference in the inflection which is noticeable to a Chinaman?
A. Yes, sir.
Q. Then in the pronunciation, while the names are pronounced the same they are of a different inflection?
A. Yes.
Q. One with a rising and one with a falling?
A. Yes.
Q. Which is the rising?
A. No. 1 is a rising inflection.
Q. And No. 2?
A. Is a falling inflection.

Q. Is it not a fact that in Chinese there are a great many words which are pronounced the same except as to the inflection?
A. Yes.
Q. That is so with a great many words?
A. Yes.

Recross-examination by Mr. KOHLER:

Q. When you say they are pronounced alike you mean the inflection may be alike and yet not alike?
A. That is what it amounts to; yes.

By Mr. BEECHER:

Q. In the *the* inflection, is there such a difference so that a Chinaman would recognize the difference?
50 A. Any one who is educated would recognize the difference.
Q. You mean educated in Chinese?
A. Yes.

Counsel for defendant offers in evidence the affidavit of Li Sing, the defendant; of Sam Palmer a Chinaman; of Li Cheong, also a Chinaman; of Charley Li, another Chinaman; of Lee Gang, another Chinaman, and Li Seu, another Chinaman, with the same force and effect as if they had been called and testified here.

Objected to on the ground that under section 2 of the act of 1893, the fact therein referred to cannot be established by the testimony of Chinese witnesses, but must be established by the testimony of credible white witnesses other than Chinese; on the further ground that under the same section the fact as to business being conducted, in the language of the statute must be established by the firm books themselves.

Decision reserved.

Marked for identification Exhibit 8.

The cases in which the commissioner has reserved his ruling are made the basis of separate motions to strike out that testimony on behalf of the Government.

In case the commissioner should grant those motions, an exception is given in each instance to the defendant.

Counsel for defendant moves to dismiss proceedings at the opening of the case upon the ground that the action of the collector, in admitting the defendant, is conclusive upon the Government; second, upon the ground that the statute requiring the defendant to assume the affirmative is unconstitutional and void, and on such other grounds as were made in the Li Foon case.

51 Counsel for Government asks for an order of deportation.

Counsel for defendant requests an adjournment.

Adjourned to Tuesday, June 22, 1897, at 3 p. m.

NEW YORK, *June* 24, 1897.

Present: Max J. Koehler, assistant United States attorney, for the Government; Samuel Scoville, for the defendant; and the defendant.

The COMMISSIONER: Upon all the evidence herein, treating all the evidence objected to by the United States attorney on which I reserved decision as in, I am of the opinion upon the conflicting testimony that the defendant is a Chinese laborer, was such at the time he departed from China and for a term of years prior thereto, and was such since his return from China last year. If it were necessary to decide the Government's motion to strike out testimony objected to, I should sustain the objection and hold that the provisions of section 2 of the act of 1893 applied to it. I must, therefore, order his deportation.

The accused is therefore held by the commissioner for deportation.

52 FOR IDENTIFICATION, EXHIBIT No. 8. J. A. S., U. S. Comm'r.

U. S. Circuit Court.

UNITED STATES
vs.
LI SING.

CITY AND COUNTY OF NEW YORK, *ss:*

Li Sing, being duly sworn, says: I came to the United States eighteen years ago. After a short stop in San Francisco I came to the city of Newark, N. J. When I first came to Newark I went into partnership with my brother Li Zing in the laundry business, of which we were the proprietors. After three years I returned to China remaining about one and a half years. I then came back to Newark and entered into partnership with Lee Ging in the laundry business, of which we were proprietors, and in which we employed others as workmen. I remained continuously at Newark until the summer of 1893. When I again revisited China, returning to this country in the summer of 1896. Early in the summer of 1891 I sold out all of my interest in the laundry business to my brother, Li Zing. I have never since then had any interest in the laundry business or been connected therewith in any manner.

In about the year 1887 I bought an interest or share in the grocery firm of Sam Palmer & Co., of Newark, N. J., paying the sum of $1,200 therefor; this was paid in different installments
53 from time to time. When I first bought this share or interest I did not take part in the management of the business, but when I sold out my interest in the laundry then I entered the store of Sam Palmer & Co. and gave all of my time to that business. Our business was and is a general Chinese grocery business, our customers being almost altogether Chinese. Since 1891 I have not

been a laborer or in any manner engaged in laboring, except as to such matters as are incidental to my grocery business.

My partners in Sam Palmer & Co. are Sam Palmer, Li Yuen, Li San, Li Wong and Li Ki Wch. When I revisited China in 1893, it was for the purpose of visiting my friends and relations there again, also in the interest of my firm, purchasing Chinese goods for them, which I had shipped to the United States. It was my intention to return again to Newark.

Before leaving in 1893, I applied at the Chinese consulate in New York, and procured from the Chinese consul a certificate such as were then in use and as then required for Chinese wishing to visit China and return. This certificate is the kind that is still in use; this I had countersigned by the United States official at the custom-house in New York. This was again countersigned by the United States consul at Hong Kong. I annex said certificate hereto. Upon my return to this country I presented myself to the deputy collector at Malone and produced to him my certificate. After investigating the facts in my case he *directed* that I was entitled to re-enter and permitted me to do so. It was my intention to return to this country to resume my business as a merchant and it was not my intention to resume the laundry business in any manner. I have frequently visited my brother at his laundry since my return back, socially and as a customer, as I sell his firm goods, but have never been engaged therein as a laborer in any manner. I
54 also have a small interest in the firm of Quong, Yet & Co., 3 Doyer street, New York city.

his
LI x SING.
mark.

Sworn to before me this 1st day of June, 1897, after being interpreted by J. C. Thoms.

FRED'K W. FIELDING,
Notary Public, Queens Co., N. Y.

Cert. filed in N. Y. Co., N. Y.

U. S. Circuit Court.

UNITED STATES }
vs. }
LI SING. }

CITY AND COUNTY OF NEW YORK, *ss.*:

Sam Palmer, being duly sworn, says: I am the senior partner of Sam Palmer & Co., a Chinese grocery in Newark, N. J. My firm is Sam Palmer & Co.; have been merchants engaged in the grocery business for over twelve years.

I am well acquainted with Li Sing, and have known him for about fifteen years. I knew him well when he was engaged in the laundry business in Newark. He was at first in partnership with his brother, Li Zing. After returning from a visit to China, and

somewhere about 1886 or 1887, he went into partnership
55 with Lee Gang. In 1891, Li Sing sold out his interest in the laundry business to his brother, Li Zing. When he closed out his laundry business, he became a partner in my firm of Sam Palmer & Co., contributing $1,200 to the capital of that firm. He has been a member of my firm ever since. Our customers are almost wholly Chinese, most of them being laundrymen; the members of my firm have to visit among the laundrymen a good deal, so as to secure and keep their trade. Li Sing was accustomed to visit the laundries in Newark once or twice a week.

In the summer of 1893 Li Sing returned to China on a visit, but did not dissolve his connection with our firm. He returned with his son in the summer of 1896, and resumed his duties with our firm.

The partners in Sam Palmer are myself, Li Sing, Li Wong, Li Yuen, Li Ki Wah and Li San.

To the best of my knowledge and belief, Li Sing has not in any way been connected with any laundry business since he became a member of my firm, and I believe that I would have known it if he had. I know also that he has an interest in the firm of Quong Yet, merchants, 3 Doyer street, New York.

SAM PALMER.

Sworn to before me this 2d day of June, 1897.

W. C. BEECHER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

56 U. S. Circuit Court.

THE UNITED STATES }
vs. }
LI SING. }

CITY AND COUNTY OF NEW YORK, *ss:*

Li Cheong, being duly sworn, says: I am a resident of Newark, N. J., living at 210 Mulberry street. I have lived there for the last eight years. I have known Li Sing ever since I have been in Newark; when I first knew him he was a partner of Li Gang; they owned a laundry in Newark.

A year or two after I first became acquainted with him, he sold out his share in the laundry and became a member of the firm of Sam Palmer & Co., of the same city. I know that firm very well and have been one of their regular customers. They are merchants in the grocery business. I have often seen Li Sing in their store and have dealt with him. The active members of the firm have often spoken to me about Li Sing being their partner. He is known generally among the Chinese residents of Newark, as being a member of that firm.

I have seen a great deal of him since 1891 (except when he went

to China in 1893), and have never heard of his being in any way connected with the laundry business, nor have I ever seen him do any work in connection therewith.

LI CHEONG.

Sworn to before me this 3d day of June, 1897.

W. C. BEECHER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

57 U. S. Circuit Court.

UNITED STATES
vs.
LI SING.

CITY AND COUNTY OF NEW YORK, *ss:*

Charley Li, being duly sworn, says: That he lives at 35 William street, Newark, N. J. That he has known Li Sing for about seven years. When I first became acquainted with him he owned a laundry in Newark with his partner Lee Ging. About a year after I became acquainted with him he sold out his share in the laundry and joined the firm of Sam Palmer & Co., No. 64 Springfield avenue, Newark. Sam Palmer & Co. are merchants engaged in the Chinese grocery business, and have been for a great many years. I am well acquainted with the firm of Sam Palmer & Co., and have known them since 1890. I am frequently in this store, being a regular customer. I have frequently dealt with Li Sing in their store and bought goods of him, and seen him taking an active part in the management of their store. Sam Palmer and other members of the firm also have at different times stated to me that Li Sing was a partner in their firm.

I have never seen or heard of Li Sing having anything to do with the laundry business since he sold out in 1891.

his
CHARLIE x LI.
mark.

Sworn to before me this 3d day of June, 1897.

E. C. WINTRINGHAM,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. county.

58 U. S. Circuit Court.

UNITED STATES
vs.
LI SING.

CITY AND COUNTY OF NEW YORK, *ss:*

Lee Gong, being duly sworn, says: I live in Newark, N. J., where I have lived since 1881, except for a short time when I was in China.

I am well acquainted with the defendant Li Sing, and have known him since 1881. A part of the time I worked for him in his laundry; when he returned from his first visit to China, about the year 1886, I went into partnership with him in the laundry business, continuing in that business with him until 1891, when Li Sing sold out his interest in the laundry business to his brother Li Zing. Li Sing then went into the grocery firm of Sam Palmer & Co., in said city of Newark. I know that he was a partner in that business because I often bought supplies from him at their store, and Li Sing has often come to my laundry to sell goods. Li Sing has often come to our place to visit me and his brother and to sell us goods, both before he went to China and since his return. Since Li Sing sold out his interest in the laundry to his brother, in 1891, he has not had anything to do with our laundry; I am always at the laundry during working hours, and I know that he has never worked there since he sold out.

Li Zing (Li Sing's brother) went to China last fall on a visit and has not yet returned.

LEE GONG.

Sworn to before me this 2d day of June, 1897.

W. C. BEECHER,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

59 United States Circuit Court.

UNITED STATES
vs.
LI SING.

CITY AND COUNTY OF NEW YORK, *ss:*

Li Sen, being duly sworn, deposes and says: That he is a merchant by occupation and resides in Newark, New Jersey, and is a member of the firm of Sam Palmer & Co., doing business at No. 64 Springfield avenue, said city of Newark. That he has known the defendant herein for the past ten years. That during the year 1887 he was associated with this defendant as a silent copartner in the above-mentioned firm of Sam Palmer & Co., which firm then and at all times hereinafter mentioned was engaged in the business of furnishing laundry supplies and dealing in general Chinese merchandise. That in the year 1891 Li Sing became an active partner in the firm and represented said firm in all business transactions. That in the year 1893 said Li Sing went back to China and his place as an active partner in the above-mentioned firm was left vacant and that deponent was appointed as his successor and succeeded to all his duties and responsibilities representing said firm of Sam Palmer and Co. in all and sundry business transactions and dealings and taking the same active part in the firm's business affairs that Li Sing, his predecessor, had assumed.

his
LI x SEN.
mark.

Sworn to before me this 7th day of June, 1897, after being interpreted by J. C. Thoms.

FRED'K W. FIELDING,
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

60 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

To the United States circuit court of appeals for the second circuit:

Li Sing, the petitioner herein, hereby applies for the allowance of an appeal to the United States circuit court of appeals for the second circuit from the decision and judgment or order of the U. S. circuit court, entered herein on the 18th day of August, 1897.

Dated August 19, 1897.

W. C. BEECHER,
Attorney for Li Sing, 237 Broadway, New York City, N. Y.

The foregoing application is granted and appeal allowed.

Dated New York, August 19, 1897.

E. H. LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

(Endorsed:) U. S. circuit court of appeals for the second circuit. In the matter of the application of Li Sing for writs of *habeas corpus* and certiorari. Application for and allowance of appeal.
61 W. C. Beecher, petitioner's, appellant's, attorney, 237 Broadway, N. Y. Due service of a copy of the within is hereby admitted. Dated Aug. 19, 1897. Wallace MacFarlane, U. S. att'y, attorney for appellee.

Let Commissioner Alexander take a recognizance in the sum of $500 with one sufficient surety for the appearance of appellant Li Sing in the circuit court of the United States for the southern district of New York upon the entering of a final order on the mandate of the circuit court of appeals herein. E. H. Lacombe, U. S. circuit judge. August 19, 1897. U. S. circuit court. Filed Aug. 20, 1897. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Be it remembered, that on the 19th day of August, A. D. 1897, before me, Thomas Alexander, one of the United States commissioners duly appointed by the district court of the United States, for the southern district of New York, in the second circuit, to take acknowledgments of bail, affidavits, and also to take depositions of witnesses in civil causes, depending in the courts of the United States, pursuant to the provisions of the acts of Congress in that be-

half, personally came Li Sing, principal, and James Naughton surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Li Sing, the sum of five hundred dollars ($500), and the said James Naughton the sum of five hundred dollars ($500) separately, to be levied and made of their respective goods, chattels, lands and tenements, to the use of the said United States, if default shall be made in the condition following, to wit:

Whereas, the said Li Sing was detained in the custody of John H. McCarty, as United States marshal for the southern district of New York, under commitment and warrant of deportation issued by United States Commissioner John A. Shields, and a writ
62 of *habeas corpus* to said marshal was made returnable before Hon. E. Henry Lacombe, circuit judge, on the — day of ——, 1897, under which writ said Li Sing was brought before said circuit judge to inquire into the cause of his detention, and whereas, on the 18th day of August, 1897, the said E. Henry Lacombe, circuit judge, did make his final order dismissing said writ of *habeas corpus*, and remanding said Li Sing to the custody of the marshal, and whereas said Li Sing has appealed from said final order to the United States circuit court of appeals for the second circuit, and whereas said E. Henry Lacombe, circuit judge, did thereupon on August 19, 1897, order the said Li Sing to find sufficient bail in the sum of five hundred dollars ($500) for his appearance to answer the exigency and determination of said appeal, and to personally abide the final decision and determination of said circuit court of appeals in that behalf, in default of which said Li Sing remain in custody.

Now, therefore, the condition of this recognizance is such that if the said Li Sing shall duly personally appear in said United States circuit court for the southern district of New York to answer the exigency and determination of said appeal, and personally abide the final decision and determination of said circuit court of appeals and of said circuit court upon the mandate of said court of appeals, upon the conditions aforesaid, and upon the entering of said orders on said appeal, and obey and abide the order of said circuit court, and not depart without leave, then this recognizance to be void, otherwise to be and remain in full force and virtue.

his
LI x SING. [SEAL.]
mark.
JAMES NAUGHTON. [SEAL.]

Taken and acknowledged before me the day and year first above written.

THOS. ALEXANDER,
U. S. Com'r.

63 SOUTHERN DISTRICT OF NEW YORK, *ss:*

James Naughton, of the city of New York, being duly sworn, says: That he is worth the sum of two thousand dollars ($2,000) over and above all his just debts and liabilities.

JAMES NAUGHTON.

Sworn to before me this August 19, A. D. 1897.

THOS. ALEXANDER,
U. S. Com'r.

(Endorsed:) U. S. circuit court, so. district of N. Y. In the matter of the petition of Li Sing for writs of *habeas corpus* and certiorari. Bail bond. W. C. Beecher, att'y for petitioner, 239 Broadway, N. Y. city. U. S. circuit court. Filed Aug. 19, 1897. John A. Shields, clerk.

Bond for Damages and Costs.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

Know all men by these presents, that we, Li Sing, principal, and James Naughton, surety, are held and firmly bound unto the
64 above-named United States in the sum of two hundred and fifty dollars to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 19th day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, the above-named Li Sing has prosecuted an appeal to the circuit court of appeals of the United States for the second circuit to reverse the order rendered in the above-entitled proceeding by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Li Sing shall prosecute said appeal to effect and answer all damages and costs, if he shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

his
LI x SING. [SEAL.]
mark.
JAMES NAUGHTON. [SEAL.]

Sealed and delivered and taken and acknowledged this 19th day of August, 1897, before me—

EDWIN C. WINTRINGHAM,
Notary Public, Kings Co.

Cert. filed N. Y. Co.

65 CITY AND COUNTY OF NEW YORK, *ss:*

Li Sing and James Naughton, being duly sworn, each for himself deposes and says: That he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

his
LI x SING.
mark.
JAMES NAUGHTON.

Sworn to this 19th day of August, A. D. 1897, before me-

E. C. WINTRINGHAM,
Notary Public, Kings Co.

Cert. filed N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of Li Sing for writs of *habeas corpus* and certiorari. Bond for damages and costs on appeal to circuit court of appeals of the U. S., 2d circuit. W. C. Beecher, att'y for petitioner, app'l't, 237 Broadway, N. Y. city. I hereby approve of the within bond both as to form and sufficiency of surety thereon. Dated N. Y., Aug. 18, 1897. E. H. Lacombe, U. S. cir. J. Due service of a copy of the within bond is hereby admitted, Aug. 19, 1897. Wallace Macfarlane, U. S. att'y. U. S. circuit court. Filed Aug. 20, 1897. John A. Shields, clerk.

66 United States Circuit Court for the Southern District of New York.

In the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

And now comes the petitioner, Li Sing, by W. C. Beecher, his attorney, in connection with the petition of appeal from the order entered August 18, 1897, dismissing the writ of *habeas corpus* herein and directing that the petitioner be deported, and makes and files the following assignment of error.

The court erred in holding:

1. That the action of the collector in permitting petitioner to enter the United States did not bar subsequent proceedings for his deportation.

2. That the burden of proof was thrown upon petitioner to show his right to remain.

3. That the petitioner should be deported.

By reason thereof the petitioner prays that the said order directing that petitioner be deported be reviewed, and that your
67 petitioner be discharged from custody.

Dated N. Y., August 18, 1897.

LI SING, *Petitioner.*

W. C. BEECHER,
Attorney for Petitioner, Appellant,
237 *Broadway, N. Y. City.*

(Endorsed:) U. S. circuit court, so. dist. of N. Y. In the matter of the petition of Li Sing for writs of *habeas corpus* and certiorari. Assignment of error. W. C. Beecher, att'y for petitioner, appellant, 237 Broadway, N. Y. city. Due service of a copy of the within is hereby admitted Aug. 19, '97. Wallace Macfarlane, U. S. attorney. U. S. circuit court. Filed Aug. 20, 1897. John A. Shields, clerk.

U. S. Circuit Court.

LI SING, Appellant,
vs.
JOHN H. MCCARTY, Marshal, &c., Respondent.

It is hereby stipulated that the clerk of the U. S. circuit court may omit from the transcript and the clerk of the court of appeals need not print the exhibits herein, but either side may produce and read the same upon the argument of the appeal herein. This
68 stipulation is entered into without prejudice to the motion pending in the circuit court of appeals to dismiss the appeal.
Dated December 3, 1897.

W. C. BEECHER,
Attorney for Appellant.
WALLACE MACFARLANE,
U. S. Attorney.

UNITED STATES OF AMERICA, *ss:*

To United States of America and Hon. John H. McCarthy, marshal:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit at the city of New York on the 17th day of September, 1897, pursuant to an appeal on the part of the petitioner herein, Li Sing, filed in the clerk's office of the circuit court of the United States for the southern district of New York, in a certain suit or proceeding entitled: In the matter of the application of Li Sing for writs of *habeas corpus* and certiorari to show cause, if any there be, why the decision of the U. S. circuit court, in the said appeal mentioned, should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the city of New York in the southern district of New York on the 19th day of August, 1897.

E. H. LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

W. C. BEECHER,
Att'y for Petitioner, 237 Broadway, N. Y. City.

69 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the matter of the petition of Li Sing for writs of *habeas corpus* and certiorari as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the second circuit, this fourth day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States, the one hundred and twenty-second.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

70 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

It is hereby stipulated and agreed that the transcript of record herein be amended by the insertion of Exhibits "A" and "B," hereto annexed, which were inadvertently omitted from the return to this court and in the printed transcript of record.

Dated December 28th, 1897.

WALLACE MACFARLANE,
U. S. Attorney.
WILLIAM C. BEECHER,
Attorney for Relator, Appellant.

It is so ordered.
E. H. LACOMBE.

71 EXHIBIT "A."

The President of the United States of America to the marshal of the United States for the southern district of New York, and to his deputies or any or either of them:

Whereas, complaint on oath hath been made to me, charging that Li Sing did, on or about the 27th day of August, in the year one thousand eight hundred and ninety-six, at the southern district of New York, unlawfully enter the United States, being a Chinese person not authorized by law to enter the United States; that said Li Sing is a Chinese laborer, and has been such for several years last past, and presented no papers or certificate lawfully entitling him as such laborer to enter the United States, against the peace of the United States and their dignity, and contrary to the form of the statute in such case made and provided,

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said Li Sing and bring his body forthwith before me, or some judge or justice of the United States, wherever in the State of New York he may be found, that he may, then and there, be dealt with according to law for the said offense.

Given under my hand and seal, this sixth day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

WALLACE MACFARLANE,
United States Attorney.

72 EXHIBIT "B."

The President of the United States of America to the marshal of the United States for the southern district of New York, and to his deputies or either of them:

Whereas, complaint upon oath was duly made before me, a commissioner for the circuit court of the United States for the southern district of New York, charging one Li Sing, a Chinese person, with being then and there unlawfully within the United States, and the said Li Sing having been arrested and brought before me by the marshal of the United States for said district upon a warrant issued by me upon the said complaint, and it appearing upon an examination before me by the evidence presented that said Li Sing is a Chinese person who left China en route for the United States, and the said Li Sing having failed to establish to my satisfaction his lawful right to remain in the United States; and

Whereas, the said Li Sing having failed to make it appear to me that he is a subject or citizen of some other country;

Now, therefore, you and each of you are hereby commanded in the name of the President of the United States to remove the said Li Sing from the United States as provided by law.

Witness my hand and seal this 24th day of June, 1897.

JOHN A. SHIELDS,
Commissioner of the Circuit Court of the United States for the Southern District of New York.

(Endorsed:) U. S. circuit court of appeals for the second circuit. In the matter of the petition of Li Sing, &c. Stipulation and order. Wallace Macfarlane, United States attorney. U. S. circuit court. Filed Jan. 3, 1898. John A. Shields, clerk.

73 United States Circuit Court of Appeals for the Second Circuit, October Term, 1897.

Submitted March 7, 1898; decided April 7, 1898.

In the Matter of the Application of LI SING for Writs of *Habeas Corpus* and Certiorari. No. 93.

Appeal from the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Shipman.

In June, 1893, Li Sing, then a resident of Newark, New Jersey, returned to China and took with him a certificate, issued by the imperial government of China at its consulate at New York, and signed by its consul, that he was permitted to return to the United States and was entitled to do so, and which, furthermore, styled him a wholesale grocer. This certificate was viséd in Hong Kong by the United States consul on June 27, 1896, when Li Sing was

about to return to this country. He thereafter returned by the way of Canada, presented the certificate to the United States collector of customs at Malone, New York, who cancelled it on August 28, 1896, and permitted him to enter the country. On January 6, 1897, the United States officer, who is called the Chinese inspector for the port of New York, represented in writing and under oath to John A. Shields, Esq., United States commissioner for the southern district of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was and had
74 been for many years a Chinese laborer, whereupon he was brought before the commissioner for examination. The counsel for Li Sing insisted before the commissioner that by the action of the collector of customs at Malone, the question of the Chinaman's right to be and remain in this country was *res adjudicata*, and, furthermore, that he was a merchant. Testimony to this effect was given by Chinese witnesses exclusively, which was received by the commissioner, notwithstanding the objection of the attorney for the United States. The commissioner found upon all the evidence that Li Sing was at the time of the examination a Chinese laborer, was such at the time he departed for China and for a term of years prior thereto, and was such after his return from China in August, 1896, and simply ordered his deportation, and did not order imprisonment as a punishment or penalty. A writ of *habeas corpus* and a writ of certiorari were thereupon allowed by the circuit court for the southern district of New York upon Li Sing's petition, and after a hearing, the writ of *habeas corpus* was dismissed and the relator was remanded to the custody of the United States marshal for deportation. This appeal was taken by the relator from the order of the circuit court.

SHIPMAN, *Circuit Judge:*

The questions which can be presented upon the writ of *habeas corpus* relate to the jurisdiction of the commissioner and the legality of the order of deportation. It is claimed that he had no jurisdiction because the action of the collector at Malone was a finality, and that the relator cannot be detained because the provisions of the third section of the act of May 5, 1892 (27 Stat., 25) under which his examination was conducted, were in violation of the Constitution.

The proceedings for Li Sing's deportation were instituted by Inspector Scharf under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat., 115), which provides that "no Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of
75 customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came." The required certificate in regard to persons not laborers, was specified in the sixth section of the same amended act, was to be obtained from the Chinese government by every Chinese person other than a laborer, who was about to come to the United States, and was for

the purpose of identifying the person and evidencing the permission of the government for his departure. The section provided that this certificate "shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

It is not now contended that under sections 6 and 12, the opinion of the collector of customs in regard to the character of the certificate was final. "On the contrary, the implication of section 12 is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises, was not intended to be interfered with." U. S. *v.* Jung Ah Lung (124 U. S., 621, 629).

Section 12 of the act of September 13, 1888 (25 Stat., 476), is the one upon which the relator relies. This act was passed to take effect, as a whole, upon the ratification of a treaty then pending between the United States and the emperor of China, which was never ratified. Section 12 of this act provided that "the collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States and his decision shall be subject to review by the Secretary of the Treasury and not otherwise." If this section had gone into effect and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been
76 final. Nishimura Ekiu *v.* U. S. (142 U. S., 651, 660).

The treaty not having been ratified, a new act of October 1, 1888 (25 Stat., 504), was passed which, as stated in Wan Shing *v.* U. S. (140 U. S., 424), "declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States and who had departed or might depart therefrom, and should not have returned before its passage, to return to or remain in the United States. And it further declared that no certificates of identity, under which by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued, and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue thereof."

It will be noticed that section 4 of the statute of May 6, 1882, had provided for certificates of identity which could be given to Chinese laborers departing from this country and intending to return, and that this new statute of 1888 prohibited the future issuance of such certificates to the laboring class, so that "the result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left

with a view of returning; and that all other persons of that race except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be viséd by a representative of the Government of the United States." Wan Shing *v.* U. S., *supra.*

Section 3 of the act of October 1, 1888, provided that all the duties prescribed and powers conferred by section 12 of the
77 act of May 6, 1882, (already referred to), were made applicable to the provisions of the new act. It would seem from the contrariety between the acts of September and of October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect. U. S. *v.* Gee Lee (50 Fed. Rep., 271). We intend to express no opinion in regard to section 13 of that act.

The question is no longer a living one, for subsequently in the act of August 18, 1894, c. 301 (28 Stat., 390), Congress provided that " in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter, such decision has no more force as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the Supreme Court in U. S. *v.* Jung Ah Lung, *supra*; *In re* Li Foon (80 Fed. Rep., 881), Lem Moon Sing *v.* U. S. (158 U. S., 538).

The relator asserts the unconstitutionality of the provisions of section 3 of the act of May 5, 1892, *supra*, which required a Chinese person who was arrested under the act to establish by affirmative proof his lawful right to remain in the United States, and of the provisions of section 2 of the act of November 3, 1893 (28 Stat., 7), which required a Chinaman to establish certain facts by the testimony of two credible witnesses, other than Chinese, upon an application for entrance into the United States, on the ground that he was formerly a merchant in this country. It appears from the return to the writ of certiorari that all the witnesses for the relator were Chinese, but that the commissioner excluded nothing
78 and decided upon the entire conflicting testimony that the defendant was a Chinese laborer. The question of the constitutionality of section 2 of the act of 1893, does not therefore arise upon this record. The question of the constitutionality of provisions akin to those in section 3 of the act of May 5, 1892, in regard to requirements of proof, was settled in Fong Yue Ting *v.* U. S. (149 U. S., 698, 729). The opinions of the Supreme Court in Wan Shing *v.* U. S. (140 U. S., 424), and in Wong Wing *v.* U. S. (163 U. S., 228),

are also suggestive upon the extent of the power of Congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully in the country.

The order of the circuit court is affirmed.

William C. Beecher, for the appellant.

Max J. Kohler, assistant United States attorney, for the United States.

79 United States Circuit Court of Appeals, Second Circuit.

In the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

CIR: Please take notice that an order of which the annexed is a copy will be handed to Mr. William Parkin, clerk of the U. S. circuit court of appeals for the second circuit, at his office, room 135, P. O. building, New York city, N. Y., on Wednesday, April 27th, 1898, at 11 o'clock a. m., to be by him forwarded to the several judges of the circuit court of appeals who heard and decided the appeal herein for their signature.

HENRY L. BURNETT,
U. S. Attorney, P. O. Building, N. Y. City.

To William C. Beecher, Esq., attorney for relator.

80 At a stated term of the circuit court of appeals of the United States of America for the second circuit, held at the United States court rooms, in the city of New York, on the 29th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Hon. William J. Wallace, Nathaniel Shipman, judges of the circuit court of appeals.

In the Matter of the Petition of LI SING for Writs of *Habeas Corpus* and Certiorari.

An appeal from the decision of the circuit court of the United States for the southern district of New York discharging the writs herein, taken herein by the above-named Li Sing on the 19th day of August, 1897, having come on to be heard, and due deliberation having been had thereon:

Now, on motion of Henry L. Burnett, United States attorney, of counsel for the United States, appellee, and on all the proceedings had herein, it is—

Ordered that said order and decree of the circuit court be, and it is hereby, affirmed; and it is further—

Ordered that a mandate issue to the circuit court of the United States for the southern district of New York accordingly.

N. S.

Endorsed: U. S. circuit court of appeals for the second circuit. In the matter of the petition of Li Sing for writs of *habeas corpus*

and certiorari. Notice and order for mandate. Henry L. Burnett, U. S. attorney, attorney for United States. A copy of the within is received this 23rd day of April. Dated New York, April 23, 1898. W. C. Beecher, attorney for appellant. United States circuit court of appeals, second circuit. Filed Apr. 29, 1898. William Parkin, clerk.

81 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 80, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the petition of Li Sing for writs of *habeas corpus* and certiorari, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-third.

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 10, 10, '98. W. P., cl'k.]

82 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which Li Sing is appellant and The United States is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed

83 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

84 [Endorsed:] Supreme Court of the United States. No. 689. October term, 1898. Li Sing *vs.* The United States. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Apr. 11, 1899. William Parkin, clerk.

85 Supreme Court of the United States.

LI SING, Petitioner,
against
UNITED STATES.

It is hereby stipulated, consented, and agreed that the certified copy of the transcript herein now on file with the clerk of this court be taken as a return to the writ of certiorari granted February 1st, 1899.

WM. C. BEECHER,
Att'y for Petitioner.
HENRY L. BURNETT,
Att'y for Respondent.

86 [Endorsed:] Supreme Court of the United States. Li Sing, petitioner, against United States. Stipulation. Beecher & Scoville, attorneys for petitioner; office and post-office address, 237 Broadway, borough of Manhattan, New York city, N. Y.

87 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, April 12th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 4, 12, '99. W. P.]

88 [Endorsed:] United States circuit court of appeals, second circuit. Li Sing *vs.* United States. Return to writ of certiorari.

89 [Endorsed:] File No., 17,274. Supreme Court U. S., October term, 1898. Term No., 195. Li Sing, petitioner, *vs.* The United States. Writ of certiorari and return. Filed April 20, 1899.

Endorsed on cover: Case No. 17,274. U. S. C. C. of appeals, 2nd circuit. Term No., 195. Li Sing, petitioner, *vs.* The United States. Filed January 21, 1899.

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FILED 411
JAN 21 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court

OF THE UNITED STATES.

IN THE MATTER

OF

The Petition of LI SING for a Writ of Certiorari.

PETITION.

W. C. BEECHER,
Attorney for Petitioner-Appellant,
237 Broadway,
New York City.

NEW YORK:
APPEAL PRINTING CO., 14-16 VESEY STREET.
Telephone, 192 Cortlandt.
1899.

Supreme Court

OF THE UNITED STATES.

In the Matter

of

The Petition of LI SING for a Writ of Certiorari.

To the Supreme Court of the United States:

The petition of Li Sing respectfully shows:

That he is a person of the Chinese race and a natural born subject of the Emperor of China and is now and has been for eleven years a resident of the United States and of no other country, having his domicile in the City of Newark, State of New Jersey, where during all the time aforesaid he has been a merchant engaged in the wholesale and importing business, being a member of the Sam Palmer Company, a firm of Chinese merchants having its place of business in the City and State aforesaid. In the month of June, 1893, your petitioner left the United States for the purpose of temporarily visiting his friends and relatives in China, your petitioner having the full purpose and intent of returning to and resuming his home in the United States in the City and State aforesaid. At the time of his departure from this country your

petitioner procured satisfactory evidence of his status in the United States as a merchant in the form of a certificate under the regulations in that regard adopted July 3d, 1890. At the Port of Hong Kong your petitioner procured this said certificate to be duly countersigned by the representative of the United States. Thereafter your petitioner left China to return to the United States and on the 27th day of August in the year 1896, applied for admission into the United States and presented the proofs of his status in the United States, as a merchant to one, Porter, Deputy Collector of Customs at the Port of Malone, State of New York. Said Collector of Customs after examining and cancelling the certificates and papers of identification presented to him by your petitioner admitted their sufficiency and that your petitioner was entitled to the protection of the Treaty between the United States and China, concluded July 28th, 1868, and the Supplemental Treaty concluded November 17th, 1880, and the Act of Congress entitled "An Act to Execute Certain Treaty Stipulations relating to Chinese," approved May 6th, 1882, as amended July 5th, 1884, and allowed your petitioner to re enter the United States. Your petitioner thereupon returned to the City of Newark, State of New Jersey aforesaid, and resumed his occupation as a merchant with said firm of Sam Palmer Company. Thereafter upon the complaint of one J. T. Scharf, the Chinese inspector for the Port of New York, your said petitioner was arrested and charged with being unlawfully within the United States. Thereafter proceedings were had before the Honorable John A. Shields, a Commissioner of the United States and your petitioner was committed on said charge. Thereafter by his counsel William C. Beecher, residing at No. 123 Columbia Heights in the City of New York, Borough of Brooklyn, State of New York, and having his office at Number 237 Broad-

way in the same city, Borough of Manhattan, and on the twenty-fourth day of June, 1897, your petitioner obtained a writ of habeas corpus directed to the Marshal of the United States for the Southern District of New York and allowed by the Honorable E. Henry Lacombe of the United States Circuit Court, Southern District of New York and on the same day a writ of certiorari directed to the Honorable John A. Shields, United States Commissioner for the Southern District of New York and allowed by Honorable E. Henry Lacombe aforesaid.

Thereafter and on the eighteenth day of August, 1897, an order was entered in the above-mentioned Court dismissing the said writ of habeas corpus and remanding your petitioner to the custody of the United States Marshal for the Southern District of New York for deportation.

Your petitioner applied for an allowance of an appeal to the United States Circuit Court of Appeals for the Second Circuit and on the nineteenth day of August, 1897, his application was granted and such appeal allowed by Honorable E. Henry Lacombe aforesaid and on the twenty-fourth day of August, 1897, assignment of error herein was duly made and filed with the clerk of the Circuit Court aforesaid by your petitioner's counsel aforesaid.

Thereafter and on the twenty-ninth day of April 1898, an order was entered in the said United States Circuit Court of Appeals for the Second Circuit affirming the decision of the Circuit Court aforesaid and directing that a mandate issue to the Circuit Court of the United States for the Southern District of New York accordingly.

The settlement of a proposed order on this mandate remanding your petitioner to the custody of the United States Marshal for deportation, as your petitioner is informed by his attorney, has been adjourned to the thirtieth day of January, 1899,

and your petitioner is now under bonds to appear before the Circuit Court aforesaid at that time.

Your petitioner is advised by his attorney, William C. Beecher, who resides as aforesaid and is a counsellor of this Court that the restraint and detention under which your petitioner suffers is illegal and unauthorized and that the said United States Circuit Court of Appeals for the Second Circuit has erred in its proceedings and determination.

Wherefore your petitioner prays for a writ of certiorari for the purpose of reviewing the proceedings and determination of the said United States Circuit Court of Appeals for the Second Circuit, and of delivering and discharging your petitioner from restraint.

William C. Beecher
Atty for Petitioner

his
Li X Sing
mark

City and County of New York, ss.:

Li Sing, being duly sworn, deposes and says that he is the petitioner herein, that he has had the foregoing petition read to him and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Sworn to before me this
7th day of January 1899.
Richd B. Kelly
Notary Public
N.Y. Co.

his
Li X Sing
mark.

No. 689. 1898

689

Supreme Court U.S.
FILED
JAN 21 1899
JAMES H. McKENNEY,
Clerk

Brief of Beecher for Petitioner

Supreme Court

OF THE UNITED STATES.

Filed Jan. 21, 1899.

IN THE MATTER

OF

The Petition of LI SING.

BRIEF.

W. C. BEECHER,
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Supreme Court

OF THE UNITED STATES.

In the Matter

of

The Petition of LI SING.

This is an appeal from an order of the Circuit Court of Appeals of the United States of America for the Second Circuit, filed April 29, 1898, and affirming the action of the Circuit Court for the Southern District of New York which affirmed the action of the U. S. Commissioner in ordering the deportation of the petitioner.

It is conceded that the petitioner had for many years been a resident of Newark, N. J.

In the summer of 1893 he visited China intending to return to this country; for that purpose he procured the customary certificate from the representative of his government, the Chinese Consul, and had the same vised in the usual manner.

When about to return he presented this certificate to the U. S. Consul at Hong Kong, who countersigned the same. He applied for re-admission at the Port of Malone and presented his papers to the U. S. Deputy Collector stationed at that point. After a careful investigation by the Deputy

Collector running over several weeks, he was permitted to re-enter the United States and has remained here since.

He was then arrested on the charge of being unlawfully within the United States, and ordered by the Commissioner to be deported. On review by writs of certiorari and habeas corpus the action of the Commissioner was affirmed, and from such order this appeal is taken.

I.

It must be kept in mind that this proceeding is not based on petitioner's application for leave to re-enter the United States. That question was determined by the Collector at Malone.

That collector acted in his official capacity and represented the government and his action is binding upon the government until reversed.

It must therefore be assumed that petitioner was lawfully and properly admitted to this country. It will be noted that he is not charged with having unlawfully come into this country but with unlawfully remaining here. If he was admitted by the act and consent of the United States after an investigation which established his right to enter, and if he has remained here relying on that right, then it cannot be said that he is unlawfully remaining here.

II.

It has frequently been decided and can hardly now be questioned that the United States may delegate to certain executive officers the power and the duty of determining whether if a Chinaman apply for admission to this country, he is entitled to enter within its territory.

Where such authority is so delegated it must be plain that the action of said agent is the action of the government and is binding upon it.

The law as it now stands as amended by the Act of 1894, places the power and duty of determining the admissibility of a Chinese applicant exclusively in the hands of the Collector of the Port of Entry.

As was said by the Supreme Court in Lem Moon Sing, 158 U. S., 538-550:

> "We mean only to decide that that ques-
> "tion (the right of entry) has been constitu-
> "tionally committed by Congress to named
> "officers of the Executive Department of the
> "government for final determination."

No claim is made by the Government that any one could pass upon the petitioner's admissibility into this country when he applied for entry, except the Collector.

In other words the Collector's jurisdiction over that question was exclusive.

III.

The Collector at Malone having exclusive jurisdiction to hear and determine the right of petitioner to enter, his determination is conclusive on all matters relating to the question brought before him.

As the law stood when the petitioner was admitted to this country, the Collector alone had power to pass upon his admissibility. Any error committed by him could be reviewed only by the Secretary of the Treasury.

By Sec. 12 of the Act of Sept. 13, 1888, it was enacted:

> "And the Collector shall in person decide
> "all questions in dispute, and his decision
> "shall be subject to review by the Secretary
> "of the Treasury, and not otherwise."

Some doubt has been raised as to how far that Act ever went into effect. The first and last sections are made expressly dependent upon the ratification of a then pending treaty between this and the Chinese governments. But every Court which has considered the subject has held that some parts of the Act became operative.

This statute seems to have been considered first in August of 1891, in the case of

United States vs. Jim, 47 Fed. Rep , 431, the Court saying:

> "It is my opinion, however, that every "part of the Act became effective from the "date of its approval except the particular "provision of the 1st and 15th sections, "which are specially, by the provisions con- "tained therein, made to depend for vitality "upon the contingency of the ratification at "a future time of the pending treaty. The "*other parts of the statute* are not of such a "character as to be necessarily dependent "upon any of the provisions of either the "1st or 15th sections. They can and do fit "into the body of the general laws of this "country, as well without as with the 1st "and 15th sections * * * and contribute "toward making the system complete and "harmonious."

In September, 1891, the same question came up in Vermont in

Re Wah Wong Gee, 47 Fed. Rep., 433, the Court saying:

> "Parts of the act were made to take ef- "fect on the ratification of the treaty, and "*the rest including Sec. 13 providing for* "*an appeal, were made to take effect pres-* "*ently*, and became at once, and are now a "part of the law of the subject."

In November of the same year the question came up again in Michigan, in the case of

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Here the Court held that Sections 1, 3, 4 were dependent upon ratification, but that *Sec. 12* was plainly and absolutely an independent measure "equally conducive to the enforcement of the Act "whether the treaty be ratified or not."

In December, 1891, this question came up again in the case of

United States vs. Lee Hay, 48 Fed. Rep., 825.

In that case the facts were very similar to those presented here, after holding that Sec. 12 of the Act of 1888 was in force, the Court applied the principles of *res adjudicata* in the following strong and emphatic language:

> "Every question as to his right to return "has been once passed upon by a representa- "tive of the United States, specially author- "ized, and required to make careful enquiry "as to the facts, and decide such question. "* * * When an officer or special tribunal "is expressly empowered to receive and ex- "amine proofs and decide any question of "fact necessary to be determined in the "course of administration of the govern- "ment or execution of the laws, *and no "power of review is given to the Courts by "statute*, the finding of facts made by such "officer or special tribunal pursuant to such "authority is conclusive upon the parties "affected and upon the Courts, unless it can "be impeached for fraud.
>
> "Upon this principle the Courts are pre- "cluded from re-opening a case once passed

> "upon by such an authorized officer or "special tribunal, for the mere purpose of "inquiring whether or not the decision was "predicated upon legal or sufficient evi- "dence."

This case was afterwards affirmed by the Circuit Court of Appeals, but upon a different line of reasoning, the Court holding that Sec 13 of the act in question was operative, but thought the other sections inoperative—a somewhat inconsistent conclusion. As their decision was put on other grounds, this part of the opinion might properly be considered as *obiter*.

Still later comes the case of United States vs. Long Hop, 55 Fed. Rep., 58. Here the Court holds that *all of the act was in force* except the first three or four sections and Section 15. It followed and adopted the opinion in United States vs. Jim, *supra*.

It is significant that this case came out a year or two later than the decision in the Lee Hoy appeal, and that the Court evidently did not consider the *obiter dictum* of the Circuit Court of Appeals on this question as controlling.

As to conclusiveness of the Collector's action see also

Re Day, 27 Fed. Rep., 678.

The United States having once determined by a legally authorized official that the petitioner was entitled to come into this country cannot now repudiate its own action to the petitioner's detriment, at least until the determination of its own tribunal has been reversed by lawful review. The only method of reviewing the Collector's action is by appeal to the Secretary of the Treasury.

This precise question has already been decided and it has been held that where an alien has once been admitted he cannot be arrested for deporta-

tion, except by the Secretary of the Treasury who must proceed within one year.

R. L. Fieri, 52 Fed. Rep , 293.

The rule invoked here falls plainly within the well known principles of *res adjudicata*.

In the case of U. S. vs. Chung Shee (76 Fed. Rep., 951), the Circuit Court of Appeals held that where the right to enter had once been determined by a tribunal having jurisdiction of the subject matter, such determination was *res adjudicata* and conclusive on the question of *his right to remain*. That it once being determined that a person had the right to enter, such determination would be conclusive on *his right to remain*.

If the government thinks that the petitioner had no right originally to enter this country, then it should review the action of the Collector by an appeal to the Secretary of the Treasury. It cannot attack the action of the Collector collaterally in these independent proceedings.

The Chung She case, which is relied upon by the Government, does not sustain its contention. One of the principal questions there considered was whether the Federal Courts *could review by appeal* the determination of the Collector, and the opinion shows (p. 953) that "An appeal was taken *from said findings and judgment* to the District Court," &c., *that is, the findings and judgment of the Collector*.

It is not contended by the petitioner here that the action of the Collector is so final that it cannot be reviewed, *but that it is final until it is reviewed and reversed or modified*, by the proper reviewing authority.

It certainly cannot be questioned in an independent original proceeding like this. The right to review does not carry with it a right to ignore. If the Government had taken steps to review the action of the Collector in any tribunal of competent

jurisdiction, it would have presented the question which was examined in the Chung Shee case, viz., can the Government review the action and determination of the Collector?

It might be noted that the review of the Collector's decision in Chung Shee's case occurred before the passage of the Act of 1894, and it might be a serious question whether under that Act the sole reviewing tribunal was not the Secretary of the Treasury.

The Loo Way case goes no further than the Chung Shee case; it only determines that the action of the Collector may be reviewed. That proposition is not questioned here because it does not arise.

It can hardly be claimed that the proceeding before the Commissioner in the petitioner's case was in the nature of an appeal from the Collector's decision.

1st. Because there is no power conferred on the Commissioner to sit *as a Court of review*. The Collector's decision can only be reviewed by certiorari to the appropriate appellate tribunal or by appeal to the Secretary of the Treasury.

2d. These proceedings were based upon the charge of being unlawfully within the country. The record shows that there was no notice of appeal or writ of review of any kind.

3d. If these proceedings were in the nature of a review, then the burden should have been on the party appealing to overcome the presumption in favor of the decision. But the Commissioner ruled that the burden was on the petitioner, that is, the respondent was required to establish the legality of the decision from which the other side had appealed. Such a ruling, if the proceedings were in the nature of an appeal, would have been absurd. His ruling was based on Section 3 of Act of 1892, but that clearly relates to original proceedings, and

has nothing to do with proceedings by way of appeal.

It is perfectly plain that the proceedings before the Commissioners were original proceedings and not in the nature of an appeal.

IV.

The ruling of the Commissioner that the burden of proof was cast upon the petitioner was erroneous.

Section 3 of the Act of 1892 purporting to create such a rule relates only to those arrested under the provisions of that act and the act of 1882 as amended in 1884.

That Section is clearly a plain violation of the Constitution. The guarantees and protection of the constitution are just as much for the benefit of an alien as for a citizen.

This precise question, whether the Constitutional provisions would protect an alien Chinaman, was presented in the case of

Wong Wing vs. U. S. (163 U. S., 228-238),

and the Supreme Court said:

> "These provisions are universal in their "application to all persons within the ter- "ritorial jurisdiction without regard to any "difference of race, of color or nationality, "and the equal protection of the laws is a "pledge of equal laws."

See also Yick Wo vs. Hopkins, 118 U. S., 356.

In this case the Supreme Court, after stating the rule as quoted in the Wong Wing case, said:

> "The questions we have to consider and "decide in these cases, therefore, are to be "treated as involving the rights of every

"citizen of the United States, equally with "those of the strangers and aliens who now "invoke the jurisdiction of this Court."

The meanest Chinese alien is entitled to the same rights under the Constitution as the most enlightened citizen of this country.

He is entitled to have the laws construed and enforced in his case with the same equality as a citizen.

The 14th Amendment of the Constitution specifically guarantees the equal protection of the laws.

It was expressly held that a statute which permitted a different rule of law in the case of an alien from that which citizens enjoyed were unconstitutional.

It is the fundamental principle of our law that every man shall be presumed innocent of any charge preferred against him until he shall be proved to be guilty, and a law which presumes that a man of a *particular race* is doing an unlawful act from the mere fact of his nationality without requiring any proof, is a violation of the Constitutional guarantee of equal protection.

Sections 3 and 4 of the Act of 1892 must be read together, as they stand a Chinaman for no other reason than that he is a Chinamen becomes liable to a judgment which exposes him not only to deportation but to imprisonment, not only *without a trial*, but without *any proof being presented*.

It was on these grounds that the Supreme Court declared Section 4 to be unconstitutional.

Wong Wing vs. U. S., *supra*.

But if we disregard Section 4 and consider it as having been expunged, the same criticism applies to Section 3.

The Act of 1892 expressly continues in force the pre-existing statutes. The Act of 1882 and 1884 explains under what circumstances it is unlawful for a Chinaman to enter or remain in this country. Section 16 of Act of 1884 makes every violation of these laws a misdemeanor punishable by fine and imprisonment.

Section 3 of Laws of 1893, as we have seen, declares that any Chinaman arrested under that act or the previous acts shall be adjudged a violator of the laws (and so liable to fine and imprisonment), without a trial, or any proof being presented against him, because unless he takes up the burden of proof he stands convicted by operation of law, so that this section accomplishes the very thing which is so sharply condemned in the Wong Wing case.

V.

That provision of the law that excludes Chinamen as witnesses and requires an applicant to prove his standing as a merchant, by white witnesses only, is violative of the Constitution which guarantees equal rights and equal laws to all.

No law can stand which forbids a man from calling his own countrymen as witnesses; that is creating a new and harsh rule of evidence and confining it to a single race as above.

VI.

This whole system of statutes constitutes a most shameful mockery of justice. They were passed to favor the blind and bitter prejudices of a small section, and ought not to be stretched one iota beyond what their strict construction requires. They

have become a disgrace to our nation, with its much vaunted love of freedom and equality, and this shame ought not to be increased beyond the limit of absolute necessity.

VII.

The order appealed from is wrong and should be reversed.

W. C. BEECHER,
Attorney for Petitioner-Appellant.

Office Supreme Court U. S.
FILED
APR 11 1900
JAMES H. McKENNEY,
Clerk.

No. 1098. 27

Brf. of Beecher for Appt.

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Supreme Court of the United States.

Filed April 11, 1900.

IN THE MATTER

OF

The Petition of LI SING.

BRIEF.

W. C. BEECHER,
Attorney for Petitioner-Appellant,
237 BROADWAY,
New York City.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of LI SING.

This is a review by writ of *certiorari* of the action of the Circuit Court of Appeals of the United States of America for the Second Circuit, filed April 29, 1898, and affirming the action of the Circuit Court for the Southern District of New York, which affirmed the action of the U. S. Commissioner in orde ing the deportation of the petitioner.

It is conceded that the petitioner had for many years prior to 1893 been a resident of Newark, N. J.

In the summer of 1893 he visited China intending to return to this country; for that purpose he procured the customary certificate from the representative of his government, the Chinese Consul, and had the same viséd in the usual manner.

When about to return he presented this certificate to the U. S. Consul at Hong Kong, who countersigned the same. He applied for readmission at the Port of Malone, State of New York, and presented his papers to the U. S. Deputy Collector stationed at that point. After a careful investigation by the Deputy Collector, running over several weeks, on the 27th of August, 1896, he was permitted to re-enter the United States, and has remained here since.

On the 6th of January, 1897, he was arrested on the charge of being unlawfully within the United States, and ordered by the Commissioners to be deported. On review by writs of *certiorari* and *habeas corpus* the action of the Commissioners was affirmed, and from such order this writ of review is taken.

Assignment of Error.

1. That the action of the Collector in admitting the petitioner was *res adjudicata* and conclusive until reversed on proper review.

2. That the Government had no right to institute original proceedings for petitioner's deportation.

3. That the Commissioner erred in rejecting petitioner's testimony.

4. That the certificate presented by the petitioner was valid, and entitled him to enter the United States; that its receipt in evidence for a limited purpose was error.

5. That the provisions of law requiring the petitioner to prove affirmatively his right to enter or remain are unconstitutional and void.

6. That the statutes which prohibit the use of Chinese witnesses, and which require white witnesses, are unconstitutional and void.

7. That the exclusion of the testimony of Chinese witnesses was error.

8. Petitioner was a merchant when he originally departed from this country, and was entitled to return without certificate. It was error to order his deportation.

I.

It must be kept in mind that this proceeding is not based on petitioner's application for leave to re-enter the United States. That question was determined by the Collector at Malone, who admitted him. He returned to his old home in Newark and had been living there some little time when he was arrested and brought before the Commissioner.

That Collector acted in his official capacity and represented the Government, and his action is binding upon the Government until reversed.

It must, therefore, be assumed that petitioner was lawfully and properly admitted to this country. It will be noted that he is not charged with having unlawfully come into this country, but with unlawfully remaining here, and yet the charge is attempted to be sustained by proof that he had improperly come into this country. It being substantially admitted that, if he came in lawfully, he may remain lawfully. If he was admitted by the act and consent of the United States after an investigation which established his right to enter, and if he has remained here relying on that right, it cannot be said that he is unlawfully remaining here.

II.

It has frequently been decided and can hardly now be questioned that the United States may delegate to certain executive officers the power and the duty of determining whether if a Chinaman apply for admission to this country he is entitled to enter within its territory.

Where such authority is so delegated it must be plain that the action of said agent is the action of the Government, and is binding upon it.

The law, as it now stands as amended by the Act of 1894, places the power and duty of determining the admissibility of a Chinese applicant exclusively in the hands of the Collector of the port of entry.

As was said by the Supreme Court in Lem Moon Sing, 158 U. S., 538–550 :

> " We mean only to decide that that question
> " (the right of entry) has been constitutionally
> " committed by Congress to named officers of the
> " Executive Department of the government for
> " final determination."

This Court in the still later case of U. S. vs. Wing Kim Ark (169 U. S., 649, 700), held that the power to exclude or expel was vested in the political departments of the Government, except so far as the Judicial Department was empowered either by statute or treaty.

No claim is made by the Government that any one could pass upon the petitioner's admissibility into this country when he applied for entry, except the Collector.

In other words, the Collector's jurisdiction over that question was exclusive.

III.

The Collector at Malone having exclusive jurisdiction to hear and determine the right of petitioner to enter, his determination is conclusive on all matters relating to the question brought before him.

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This statute seems to have been considered first in August of 1891 in the case of

United States vs. Jim, 47 Fed. Rep., 431, the Court saying :

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" Upon this principle the courts are precluded " from reopening a case once passed upon by such " an authorized officer or special tribunal, for the " mere purpose of inquiring whether or not the " decision was predicated upon legal or sufficient " evidence."

This case was afterwards affirmed by the Circuit Court of Appeals, but upon a different line of reasoning, the court holding that Sec. 13 of the act in question was operative, but thought the other sections inoperative—a somewhat inconsistent conclusion. As their decision was put on other grounds, this part of the opinion might properly be considered as *obiter*.

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original proceeding like this. The right to review does not carry with it a right to ignore. If the Government had taken steps to review the action of the Collector in any tribunal of competent jurisdiction, it would have presented the question which was examined in the Chung Shee case, viz., can the Government review the action and determination of the Collector?

It might be noted that the review of the Collector's decision in Chung Shee's case occurred before the passage of the Act of 1894, and it might be a serions question whether under that act the sole reviewing tribunal was not the Secretary of the Treasury.

The Loo Way case goes no further than the Chung Shee case; it only determines that the action of the Collector may be reviewed. That proposition is not questioned here because it does not arise.

It can hardly be claimed that the proceeding before the Commissioner in the petitioner's case was in the nature of an appeal from the Collector's decision.

1st. Because there is no power conferred on the Commissioner to sit *as a court of review.* The Collector's decision can only be reviewed by *certiorari* to the appropriate appellate tribunal or by appeal to the Secretary of the Treasury.

2d. The record fails to show that there was any notice of appeal or writ of review of the Collector's action of any kind.

3d. If these proceedings were in the nature of a review, then the burden should have been on the party appealing to overcome the presumption in favor of the decision. But the Commissioner ruled that the burden was on the petitioner; that is, the respondent was required to establish the legality of the decision from which the other side had appealed. Such a ruling, if the proceedings were in the nature of an appeal, would have been absurd.

IV.

The ruling of the Commissioner that the burden of proof was cast upon the petitioner was erroneous.

Section 3 of the Act of 1892 purporting to create such a rule, relates only to those arrested under the provisions of that act and the Act of 1882 as amended in 1884.

That section is clearly a plain violation of the Constitution. The guarantees and protection of the Constitution are just as much for the benefit of an alien as for a citizen.

This precise question, whether the constitutional provisions would protect an alien Chinaman, was presented in the case of

Wong Wing vs. U. S. (163 U. S., 228-238), and this Court said :

> " These provisions are universal in their appli-
> " cation to all persons within the territorial juris-
> " diction, without regard to any difference of race,
> " of color or nationality, and the equal protection
> " of the laws is a pledge of equal laws."

See, also, Yick Wo vs. Hopkins, 118 U. S., 356.

In the recent case of U. S. vs. Wong Kim Ark (169 U. S., 649), this, at page 695, reiterated the principles laid down in the Yick Wo case *inter alia.*

> " The right of the petitioners, as affected by the
> " proceedings of which they complain, are not the
> " less because they are aliens and subjects of the
> " Emperor of China. The 14th amendment to the
> " constitution is not confined to the protection of
> " citizens. It says : ' Nor shall any state deprive
> " any person of life, liberty or property without
> " due process of law ; *nor deny to any person with-*
> " *in its jurisdiction the equal protection of its laws.*'

" These provisions are universal in their applica-
" tion to all persons within the territorial juris-
" diction, without regard to any differences of race,
" color or nationality, and the equal protection of
" the laws is a pledge of the protection of equal
" laws.

" It is accordingly enacted by § 1977 of the Re-
" vised Statutes that, 'All persons within the
" jurisdiction of the United States shall have the
" same right in every state and territory to make
" and enforce contracts, to sue, be parties, give
" *evidence, and to the full and equal benefit of all*
" *laws and proceedings for the security of persons*
" *or property as is enjoyed by white citizens*
" * * *."

At page 689, the Court further said :

" The Acts of Congress, known as the Chinese
" Exclusion Acts, the earliest of which was passed
" some fourteen years after the adoption of the
" Constitutional Amendment, cannot control its
" meaning or impair its effect, but must be con-
" strued and executed in subordination to its
" provisions."

It is very plain that the rule laid down by the Commissioner, that the burden was on the petitioners, would never have been applied to an American or to any European. It was a race discrimination, which did not afford equal rights under the law.

The meanest Chinese alien is entitled to the same rights under the Constitution as the most enlightened citizen of this country.

He is entitled to have the laws construed and enforced in his case with the same equality as a citizen.

The Fourteenth Amendment of the Coustitution specifically guarantees the equal protection of the laws.

It was expressly held that a statute which permitted a different rule of law in the case of an alien from that which citizens enjoyed were unconstitutional.

It is the fundamental principal of our law that every man shall be presumed innocent of any charge preferred against him until he shall be proved to be guilty, and a law which presumes that a man of a *particular race* is doing an unlawful act, from the mere fact of his nationality, without requiring any proof, is a violation of the constitutional guarantee of equal protection.

Sections 3 and 4 of the Act of 1892 must be read together, as they stand, a Chinaman, for no other reason than that he is a Chinaman, becomes liable to a judgment which exposes him, not only to deportation but to imprisonment, not only *without a trial*, but without *any proof being presented*, for, if he does not assume the burden of proof and establish his innocence, he is adjudged to be unlawfully within the country and to be deported. If, as in the present case, he had acquired property in this country, he is liable to lose it all by his forcible deportation.

It was on these grounds that the Supreme Court declared Section 4 to be unconstitutional.

Wong Wing vs. U. S., *supra*.

But, if we disregard Section 4 and consider it as having been expunged, the same criticism applies to Section 3.

The Act of 1892 expressly continues in force the pre-existing statutes. The Acts of 1882 and 1884 explain under what circumstances it is unlawful for a Chinaman to enter or remain in this country. Section 16 of Act of 1884 *makes every violation of these laws a misdemeanor punishable by fine and imprisonment.*

Section 3 of Laws of 1892, as we have seen, declares that any Chinaman arrested under that act or the previous acts shall be adjudged the violator of the laws (and so liable to fine and imprisonment), without

a trial, or any proof being presented against him, because unless he takes up the burden of proof he stands convicted by operation of law, so that this section accomplishes the very thing which is so sharply condemned in the Wong Wing case.

V.

That provision of the law (Sec. 2, Laws of 1893) that excludes Chinamen as witnesses and requires an applicant to prove his standing as a merchant by white witnesses only, is violative of the Constitution which guarantees equal rights and equal laws to all. It cannot be said that a man ls allowed equality under the law if because of his race or color he is confined to one kind of proof, while all the rest of mankind are unrestricted.

No law can stand which forbids a man from calling his own countrymen as witnesses; that is creating a new and a harsh rule of evidence and confining it to a single race as above.

VI.

It appears without contradiction that the petitioner had for some years prior to the summer of 1893 been lawfully domiciled in this county.

That during the summer of 1893, and prior to the passage of the Act of 1893 (which was passed in November, 1893), he applied for and obtained the certificate then required by law. While he was absent the

Act of 1893 was passed, which materially changed some of the requirements of the certificate of re-entry.

It was claimed by the Government that the certificate which had been issued to the petitioner, for the purpose of securing his re-admission, was not competent for that purpose, because it did not comply with the requirements of Sec. 2 of the Act of 1893.

It is respectfully submitted that when a Chinaman who returns to China with the intent of returning to this country is required by law to obtain a certificate in a prescribed form *before he departs* and then *after he has departed* a change is made, by law, in the form or contents of this certificate which, if enforced, would render his certificate already obtained void. In such a case, the regularity of the certificate must be determined by the requirement of law, as they existed when he departed. Any other rule would be a monstrous injustice. The United States says to him in effect "If you procure a certificate in the form which we now prescribe you may depart in peace and re-enter without molestation." The man accepts this assurance, procures the certificate and departs.

May the United States, now, after his departure prescribe an entirely new and different form of certificate, nullify his former one and repudiate its assurances.

(b) When the Government designates certain officials to countersign and visé a certificate it is the duty of such officials to see that the same is in proper form. How can a foreigner, not over-conversant with our language or our laws know whether the certificate is in proper form or not when the officials of the Government certify to its regularity ?

The Government having designated certain officials whose duty it was to ascertain the regularity of these certificates and visé them, should be held estopped by their visé, from afterward questioning their regularity.

The original certificate being practically unprintable will be submitted, pursuant to the stipulation contained in the record.

(c) The petitioner had for many years prior to 1893 been a merchant in Newark, N. J. When he visited China he was entitled to return without any certificate.

U. S. vs. Lau Ow Bew, 144 U. S., 47.

VI.

This whole system of statutes constitutes a most shameful mockery of justice. They were passed to favor the blind and bitter prejudices of a small section, and ought not to be stretched one iota beyond what their strict construction requires. They have become a disgrace to our nation, with its much-vaunted love of freedom and equality, and this shame ought not to be increased beyond the limit of absolute necessity.

VII.

THE ORDER APPEALED FROM IS WRONG AND SHOULD BE REVERSED.

W. C. BEECHER,
Attorney for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

LI SING, PETITIONER,
v.
THE UNITED STATES. } No. 689.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The petitioner, Li Sing, in June, 1893, then a resident of Newark, N. J., returned to China, and took with him a certificate signed by the Imperial Government of China at its consulate at New York, and signed by its consul, that he was permitted to return to the United States, and was entitled to do so, and which, furthermore, styled him a "wholesale grocer." This certificate was viséed in Hongkong by the United States consul on June 27, 1896, when Li Sing was about to return to this country.

He thereafter returned by the way of Canada, and presented the certificate to the United States collector of customs at Malone, N. Y., who canceled it on August 28, 1896, and permitted him to enter the country. On January 6, 1897, the United States officer who is called the "Chinese inspector for the port of New York" represented, in writing and under oath, to John A. Shields, esq., United States commissioner for the southern district of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was and had been for many years a Chinese laborer, whereupon he was brought before the commissioner for examination. The counsel for Li Sing insisted before the commissioner that by the action of the collector of customs at Malone the question of the Chinaman's right to be and remain in this country was *res judicata*, and, furthermore, that he was a merchant. Testimony to this effect was given by Chinese witnesses exclusively, which was received by the commissioner notwithstanding the objection of the attorney for the United States. The commissioner found upon all the evidence that Li Sing was at the time of the examination a Chinese laborer, was such at the time he departed for China and for a term of years prior thereto, and was such after his return from China in August, 1896; and simply ordered his deportation, and did not order imprisonment, as a punishment or penalty. A writ of habeas corpus and a writ of certiorari were thereupon allowed by the circuit court for the southern district of New York, upon Li Sing's petition, and, after a hearing, the writ of habeas corpus was dismissed and the petitioner

remanded to the custody of the United States marshal for deportation.

An appeal was then taken by the petitioner from the order of the circuit court to the circuit court of appeals for the second circuit.

It was conceded by the Government that the petitioner was admitted by the collector of customs at Malone, N. Y., into the United States on August 27, 1896, upon presentation of certain documentary evidence; but the Government's counsel objected to the reception of such documentary evidence as proof of any of the facts stated in it, as it was admitted merely to show what papers were before the collector inducing him to admit relator.

The petitioner offered testimony, principally that of Chinese persons, to show that he had been a merchant for more than a year prior to his departure from the United States in the summer of 1893. To controvert this testimony the Government, by numerous witnesses, established the fact that petitioner had been a laundryman for more than a year preceding his departure for China, and became such again immediately after his return to this country. These facts were established by the testimony of credible witnesses other than Chinese. (See testimony of Richard J. Crowley, Rec., fols. 67–81. John D. Wood, Rec., fols. 82–97. Philip A. Gifford, Rec., fols. 53–66. Thomas Scharf, Rec., fols. 98–102. Frank Speath, Rec., fols. 115–125. George W. Schenck, Rec., fols. 125–133.)

Upon the convicting testimony, as produced, the commissioner adopted the statements of the Government's witnesses.

By reference to the record (fols. 71–74, 58–60), it will be noticed that some of the Government's witnesses testified to attempts made by petitioner to bribe them to testify falsely that they knew him to be a merchant.

There was no attempt made to comply with the provisions of section 2 of the act of 1893, by showing that the mercantile business was conducted in petitioner's name (which has been considered to mean proof by the production of the partnership articles and books that they contain his name); nor, by the testimony of witnesses other than Chinese, that he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as merchant. Petitioner's position seemed to be that this statute did not apply to him, as it was enacted after he left the United States, but long before he returned to this country.

Judge Lacombe affirmed the findings of the commissioner, and ordered that the writ of habeas corpus be dismissed and that the petitioner be remanded to the custody of the United States marshal for the southern district of New York, for deportation under the order of deportation signed by Commissioner Shields.

The petitioner assigned errors to the court's decision as follows:

The holding:

First. That the action of the collector in permitting petitioner to enter the United States did not bar subsequent proceedings for his deportation.

Second. That the burden of proof was thrown upon petitioner to show his right to remain.

Third. That the petitioner should be deported.

The appeal was then heard on the foregoing assignments of error by the United States circuit court of appeals, second circuit, and on April 7, 1898, the following decision was rendered:

Before Wallace and Shipman, circuit judges.

SHIPMAN, circuit judge (after stating the facts as above). The questions which can be presented upon the writ of habeas corpus relate to the jurisdiction of the commissioner and the legality of the order of deportation. It is claimed that he had no jurisdiction, because the action of the collector at Malone was a finality, and that the relator can not be detained, because the provisions of the third section of the act of May 5, 1892 (27 Stat., 25), under which his examination was conducted, were in violation of the Constitution. The proceedings for Li Sing's deportation were instituted by Inspector Scharf, under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat., 115), which provides that:

"No Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel, and any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came."

The required certificate in regard to persons not laborers was specified in the sixth section of the same amended act; was to be obtained from the Chinese Government by every Chinese person, other than a laborer, who was about to come to the United States; and was for the purpose of identifying the

person and evidencing the permission of the Government for his departure. The section provided that this certificate—

"Shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

It is not now contended that, under sections 6 and 12, the opinion of the collector of customs in regard to the character of the certificate was final. "On the contrary, the implication of section 12 is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with." (*United States* v. *Jung*, Ah Lung, 124 U. S., 621, 8 Sup. Ct., 663.) Section 12 of the act of September 13, 1888 (25 Stat., 476), is the one upon which the relator relies. This act was passed to take effect, as a whole, upon the ratification of a treaty then pending between the United States and the Emperor of China, which was never ratified. Section 12 of this act provided that:

"The collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury and not otherwise."

If this section has gone into effect, and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final. (*Nishimura Ekiu* v. *United*

States, 142 U. S., 651, 660; 12 Sup. Ct., 336.) The treaty not having been ratified, a new act, of October 1, 1888 (25 Stat., 504), was passed, which, as stated in *Wan Shing* v. *United States* (140 U. S., 424; 11 Sup. Ct., 729):

"Declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States, and who had departed or might depart therefrom, and should not have returned before its passage, to remain in the United States. And it further declared that no certificate of identity, under which, by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued; and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue thereof."

It will be noticed that section 4 of the statute of May 5, 1882, had provided for certificates of identity which could be given to Chinese laborers departing from this country and intending to return, and that this new statute of 1888 prohibited the future issuance of such certificate to the laboring class, so that—

"The result of the legislation respecting the Chinese would seem to be this: That no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning, and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese Government, or of such other foreign government as

they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be visèed by a representative of the Government of the United States." (*Wan Shing* v. *United States*, *supra*.)

Section 3 of the act of October 1, 1888, provided that all the duties prescribed and powers conferred by section 12 of the act of May 6, 1882, already referred to, were made applicable to the provisions of the new act. It would seem from the contrariety between the acts of September and of October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect. (*United States* v. *Gee Lee*, 1 C. C. A., 516, 50 Fed., 271.) We intend to express no opinion in regard to section 13, of that act. The question is no longer a living one, for subsequently, in the act of August 18, 1894, c. 301 (28 Stat., 390), Congress provided that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter such decision has no more force as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the Supreme Court in *United States* v. *Jung Ah*

Lung, supra; In re Li Foon, 80 Fed., 881; *Lem Moon Sing* v. *United States*, 158 U. S., 538, 15 Sup. Ct., 967.

The relator asserts the unconstitutionality of the provisions of section 3 of the act of May 5, 1892, *supra*, which required a Chinese person who was arrested under the act to establish by affirmative proof his lawful right to remain in the United States, and of the provisions of section 2 of the act of November 3, 1893 (28 Stat., 7), which required a Chinaman to establish certain facts by the testimony of two credible witnesses, other than Chinese, upon an application for entrance into the United States on the ground that he was formerly a merchant in this country. It appears from the return to the writ of certiorari that all the witnesses for the relator were Chinese, but that the commissioner excluded nothing, and decided, upon the entire conflicting testimony, that the defendant was a Chinese laborer. The question of the constitutionality of section 2 of the act of 1893 does not, therefore, arise upon this record. The question of the constitutionality of provisions akin to those in section 3 of the act of May 5, 1892, in regard to requirements of proof, was settled in *Fong Yue Ting* v. *United States* (149 U. S., 698, 729; 13 Sup. Ct., 1016). The opinions of the Supreme Court in *Wan Shing* v. *United States* (140 U. S., 424; 11 Sup. Ct., 729) and in *Wong Wing* v. *United States* (163 U. S., 228; 16 Sup. Ct., 977) are also suggestive upon the extent of the power of Congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully in the country. The order of the circuit court is affirmed.

POINTS IN SUPPORT OF GOVERNMENT'S CONTENTIONS.

POINT I.

NO QUESTION, EXCEPT THE ALLEGED FINALITY OF THE COLLECTOR'S DECISION, IS REVIEWABLE ON HABEAS CORPUS.

In criminal cases before committing magistrates, after defendant's commitment, the question is: Was there any legal evidence whatever to confer jurisdiction to commit and to sustain the commissioner's finding of probable cause?

Re Oteiza y Cortes, 136 U. S., 330.
Horner v. *United States*, 143 U. S., 570.
In re Chapman, 156 U. S., 211.
Ornelas v. *Ruiz*, 161 U. S., 502.
Sternaman v. *Peck*, 80 F. R., 883 (C. C. A.).

In the recent case of *Bryant* v. *United States* (167 U. S., 104) the Supreme Court, in habeas corpus proceedings, in review of the commissioner's commitment in foreign extradition cases, says:

> The question before us is even narrower than that, viz: Whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify his commitment for extradition?

In habeas corpus proceedings to review orders under the Chinese exclusion acts the scope of review is necessarily much more limited than this even. The burden of proof here is on the defendant, not on the Govern-

ment, as in criminal causes, for section 3 of the act of 1892 expressly provides "that any Chinese person or persons of Chinese descent arrested under the provisions of this act or of the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." If the decision be adverse to the Chinese person, the judge or court subsequently on the habeas is in effect asked by relator to decide that, contrary to his own holding, the magistrate in the deportation proceeding was satisfied as to facts which he officially declared he was not satisfied of. As the statute vested the original magistrate with jurisdiction to determine whether he was or was not satisfied of such facts, the views of some other tribunal can not be substituted for his in the course of habeas corpus proceedings.

Compare *In re Tsu Tse Mee* (81 Fed. Rep., 702), in which such holding was had. See also *United States* v. *Chung Shee* (76 Fed. Rep., 951).—C. C. A.

Such view is also in line with the decision of the Supreme Court, rendered prior to this burden of proof section in the act of 1892, in which the court sustained the determination of the commissioner adverse to the Chinese person, in a Chinese deportation case, on uncontradicted testimony offered by the Chinese person, which the commissioner declined to believe. (*Quock Ting* v. *United States*, 140 U. S., 417.)

Point II.

THE DECISION OF THE COLLECTOR ADMITTING RELATOR DOES NOT BAR SUBSEQUENT PROCEEDINGS BY THE GOVERNMENT TO SECURE THE ADMITTED PERSON'S DEPORTATION.

In support of this, see Judge Lacombe's clear and lucid opinion *In re Li Foon* (80 Fed. Rep., 881, 882–883).

The Chinese exclusion acts, beginning with the act of 1882, vested the collector of customs with authority to exclude Chinese persons (subject to review by the court in all cases until the act of 1894 was passed), but these statutes nowhere made the collector's determination final and unreviewable. On the contrary, by section 6 of the act of 1882, and still more markedly by its amendments in the sixth section of the act of 1884, the certificates required of the Chinese person was made only prima facie evidence, and the amendatory act of 1884 (section 6) required the Chinese person, after admission, to produce it, whenever lawfully demanded by the proper authorities of the United States, and provided that "said certificate may be controverted and the facts therein stated disproved by the United States authorities." This same act of 1884, in its section 12, amended the act of 1882 (section 12) by providing judicial proceedings for removing Chinese persons found unlawfully within the United States, this being the section under which these proceedings have been had. In connection with this section it is important to notice that it applies only to cases of Chinese persons found unlawfully within the United States by

reason of an unlawful entry into the country. Until section 6 of the act of 1892 (the Geary law) was enacted, there was no statute which provided for excluding Chinese persons from this country for any act done within this country (for instance, failure to register), but merely for an unlawful entrance into the country. This statute (section 12 of the act of 1884), therefore, provides judicial proceedings for the deportation of Chinese persons who entered the country unlawfully, and clearly looks to judicial review of such admissions.

The courts have quite uniformly held that the admission of Chinese persons by the collector does not bar subsequent judicial proceedings by the Government.

The question was considered by the Supreme Court in the case of *United States* v. *Jung Ah Lung* (124 U. S., 621), and its holding, as well summarized in the syllabus, was that "the jurisdiction of the court was not affected by the fact that the collector has passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in case of hardship." As said by Mr. Justice Blatchford in delivering the opinion of the court:

> We regard this as only a provision for specifying the executive officer who is to perform the duites prescribed, and that no inference can be drawn from that or any other language in the acts, that any judicial cognizance which would otherwise exist is intended to be interfered with.

The question has come up repeatedly also in cases exactly like this, where the collector admitted the Chinese person, and the Government subsequently instituted

judicial proceedings to secure his deportation for being in the United States unlawfully. It has been repeatedly decided, as was done by Judge Lacombe in *In re Li Foon*, that the Government was not prevented from instituting deportation proceedings by the collector's admission of the Chinese person.

> *United States* v. *Loo Way*, 68 Fed. Rep., 475.
> *United States* v. *Gee Lee*, 50 Fed. Rep., 271 (C. C. A.).
> *United States* v. *Chung Shee*, 76 Fed. Rep., 951 (C. C. A.).

The question is fully discussed and considered in the case of *United States* v. *Lee Way*, *supra*.

Second. The only case in which a contrary result was reached is the case of *United States* v. *Lee Hoy* (48 Fed. Rep., 825), which was reversed by the circuit court of appeals (ninth circuit) in *United States* v. *Gee Lee* (50 Fed. Rep., 271). This case below turns on the question whether the act of September 13, 1888 (25 Stat. L., p. 476), went into effect or not. If its section 12 became a law, the collector's determination as to Chinese persons entering this country by sea might be treated as conclusive, a view adopted by Judge Lacombe in *In re Li Foon*, where he holds that it had not gone into effect. Section 12 of this act provides:

> That before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers, and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions

> in dispute in regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise.

It will be noticed at the start that this section seems to apply only to Chinese entering the country by sea as passengers on vessels, and therefore does not meet this case at all, as relator entered the country at Malone, N. Y., on the Canadian frontier.

But section 13 is a part of an act passed September 13, 1888, entitled "An act to prohibit the coming of Chinese laborers to the United States" (2 Supp. Rev. Stat., p. 141), the first section of which provides:

> *Be it enacted, etc.*, That from and after the date of the exchange of ratifications of the pending treaty between the United States of America and His Imperial Majesty the Emperor of China, signed on the twelfth day of March, anno Domini eighteen hundred and eighty-eight, it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as hereinafter provided.

The last section of the act (section 15) provides:

> That the act entitled "An act to execute certain treaty stipulations relating to Chinese," approved May sixth, eighteen hundred and eighty-two, and an act to amend said act, approved July fifth, eighteen hundred and eighty-four, are hereby repealed, to take effect upon the ratification of the pending treaty, as provided in section one of this act.

The treaty with China referred to in this act was never ratified, as China rejected it. Accordingly the

act was omitted from the second edition of the first supplement to the Revised Statutes, as explained in a note on page 625, and the Treasury Department, by circular dated May 7, 1892, stated: "The act approved September 13, 1888, being dependent upon the ratification of the then pending treaty with China, which treaty was not ratified, is omitted." After some years certain sections of it, particularly section 13, establishing judicial proceedings for deportation and appeal to the district court, were held to be in force in spite of the nonratification of the treaty. The only case which involved section 12 directly is the case in 48 Fed. Rep., 825, and 50 Fed. Rep., 271, in which the district court held that section 12 is in force, and the circuit court of appeals held that section 12 never went into effect, but section 13 of the same act did. There seems to be no jurisdiction to-day in this country in which section 12 is regarded as in force, but there are several where section 13 is treated as in force, though it has not been so treated heretofore in this district. It must be conceded that the reasoning in the various cases, pro and con, on this subject does not appeal to the judicial mind. A full discussion of the point follows:

The question whether sections 12 and 13 are in force or not is a pure question of law, for, as held in *Gardner* v. *Collector* (6 Wallace, 499), "the judicial notice of the court must extend not only to the existence of the statute, but to the time at which it takes effect, and to its true construction." The question was treated as one of judicial notice in all the cases under the Chinese deportation laws reported.

The acts of October 1, 1888, and of September 13, 1888, are totally inconsistent with each other, and the later act must be held to have repealed the earlier act, even if the latter ever went into effect. Thus sections 6 and 7 of the act of September 13, 1888, authorized Chinese laborers to return to the United States in certain cases, upon producing certain certificates. Sections 1 and 2 of the act of October 1, 1888, however, prohibited absolutely the return to the United States of Chinese laborers. Section 13 of the act of September 13, 1888, provided a procedure by judicial methods for the deportation of Chinese persons, and some such provision would be necessary with section 12 of the acts of 1882 and 1884 repealed. But in the later act of October 1, 1888, the procedure established by section 12 is expressly made applicable, and no reference to section 13 of the act of September 13, 1888, is found. Moreover, the act of May 5, 1892, by section 1, continued in force for a period of ten years "all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent." As the act of May 6, 1882, provided that it was to be in effect for ten years, a renewal was necessary, provided the act of September 13, 1888, which was not limited in duration, was not in force; not otherwise. In like manner conflicts would arise between section 12 of the act of September 13, 1888, and the act of August 18, 1894, which latter act provided that "in every case where an alien is excluded from admission into the United States, under any law or treaty now existing, or hereafter made,

the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." As far as Chinese aliens are concerned, this provision was already made in section 12 of the act of September 13, 1888, if that section went into effect, which covered rulings adverse as well as favorable to the Chinese persons' admission. As to aliens other than Chinese, there had been earlier statutes to this effect (see *Nishimura Ekiu* v. *United States*, 142 U. S., 651). As bearing on Chinese persons, then, this statute of 1894 either was new legislation or, if the act of September 13, 1888, went into effect, the act of 1894 impliedly repealed section 12, or it was wholly superfluous legislation. This statute was construed by the Supreme Court in *Lem Moon Sing* v. *United States* (158 U. S., 538), and the court treated it as new legislation in its relation to the Chinese laws, although no express reference was made to section 12 of the act of September 13, 1888.

A correct construction of the act of September 13, 1888, the history of the legislation preceding and following it, a consideration of the later statutes, and the practical construction of the acts, all show that no portion of the act of September 13, 1888, ever went into effect.

The Attorney-General, in an opinion delivered July 23, 1889, held that the act of September 13, 1888, did not go into effect (Synopsis Treasury Decisions, No. 9519); a view announced again by the Secretary of the Treasury March 28, 1890 (Synopsis Treasury Decisions, No. 9946), and May 7, 1892 (Synopsis Treasury Decisions, 12746). On February 21, 1894, Attorney-General

Olney advised the Secretary of the Treasury that "the present validity of this (which) act is, however, still an unsettled question."

On principle and under the authorities, then, the decision of the collector admitting the Chinese person does not bar subsequent proceedings. Such a holding is also required by public policy. The Chinese person selects the port or place of entry and produces his certificate or witnesses without any notice to the Government, which does not know in advance what persons will apply for admission, or at what places, or anything about the applicants and their witnesses. It is generally, from the nature of the case, impossible for the Government to make thorough inquiries before admission, and the fact that there are only a few ports of entry results in an enormous accumulation of business in those places. If the Government were prevented from thereafter going into the question, numerous persons not lawfully entitled to enter would be able to nullify and defy our laws and remain here, commonly profiting by their own criminality. So, also, it frequently happens that the collector decides these cases without jurisdiction, for instance, in mistaking the law and allowing a person to enter without the statutory certificate which is made the sole evidence in his favor (*In re Li Foon*, 80 Fed. Rep., 881). Clearly a decision rendered by him in such a case is null and void, because he had no jurisdiction at all.

In re Feinknopf, 47 Fed. Rep., 447.
Robertson v. *Frank*, 132 U. S., 17.
134, 907 Feet of Lumber, 4 Blatchf., 182.
Dutilh v. *Maxwell*, 2 Blatchf., 541, 544–545.

On principle and authority, therefore, the collector's admission of the Chinese applicant does not bar subsequent judicial proceedings by the Government.

Point III.

THE BURDEN OF PROOF WAS PROPERLY HELD TO BE ON PETITIONER TO ESTABLISH HIS LAWFUL RIGHTS TO REMAIN IN THE UNITED STATES.

Section 3 of the act of 1892 provides:

> That any Chinese person or persons of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner his lawful right to remain in the United States.

This statute is directly in point and is controlling. It was construed by the Supreme Court in the case of *Fong Yue Ting* v. *United States* (149 U. S., 698), which involved more particularly deportation of Chinese resident laborers for failure to register. The court said (p. 729):

> If no evidence is offered by the Chinaman the judge makes the order of deportation, as upon a default. * * * The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the

courts of its own Government. (*Ogden* v. *Saunders*, 12 Wheat., 213, 262, 349; *Pillow* v. *Roberts*, 13 How., 472, 476; *Cliquot's Champagne*, 3 Wall., 114, 143; *Ex parte Fisk*, 113 U. S., 713, 721; *Holmes* v. *Hunt*, 122 Mass., 505, 516–519.) The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. (Rev. Stat., secs. 858, 1977.) The reason for requiring a Chinese alien, claiming the privileges of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act, "by at least one credible white witness," may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chang Ping's case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained, by the witnesses of the obligations of an oath" (130 U. S., 598). And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States." (Acts of March 22, 1816, c. 32, secs. 2, 3, Stat., 259; May 24, 1828, c. 116, secs. 2, 4, Stat., 311; Rev. Stat., sec. 2165, cl. 6; 2 Kent Com., 65.)

> The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from this country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

Even before the act of 1892 the Supreme Court held that the magistrate was not bound to adopt the uncontradicted testimony in the case, if the circumstances were such as to prevent him from believing affiants. (*Quock Ting* v. *United States*, 140 U. S., 417.)

So, also, in numerous later cases arising under the act of 1892, and not involving the nonregistration provision (section 6 of the act of 1892), full force and effect has

been given to section 3, throwing the burden of proof on the Chinese person.

United States v. *Chung Fung Sun*, 63 F. R., 261 (Coxe, J.).
Lew Jim v. *United States*, 66 F. R., 953 (C. C. A.).
United States v. *Loo Way*, 68 F. R., 475.
In re Li Foon, 80 F. R., 881 (Lacombe, J.).
See also: *In re Sing Lee*, 54 F. R., 334.

Under the rigorous provisions of the act of May 5, 1892, as amended November 3, 1893, the burden was on the appellants to establish by affirmative proofs to the satisfaction of the commissioner their lawful right to remain in the United States. (27 Stat., 25, sec. 3, Laws 1893, c. 14, p. 7, Coxe, J., in *United States* v. *Chung Fung Sun et al.*, 63 F. R., 261.)

(2) In the present case, petitioner attempted to show that he was entitled to return to the United States and remain here, because he is and was a merchant. To sustain this contention, it was incumbent upon him to comply also with the provisions of section 2 of the act of 1893, which enacts:

> SEC. 2. The words "laborer" or "laborers," wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.
>
> The term "merchant," as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant

is a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as heretofore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing.

Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal and shall not be admitted to bail.

The certificate herein provided for shall contain the photograph of the applicant, together with his name, local residence, and occupation, and a copy of such certificate, with a duplicate of such photograph attached, shall be filed in the office of the United States collector of internal revenue of the district in which such Chinaman makes application.

Such photographs in duplicate shall be furnished by each applicant in such form as may be prescribed by the Secretary of the Treasury.

Point IV.

The decision of the United States circuit court of appeals should be sustained, and this application for a writ of certiorari should be denied.

Henry L. Burnett,
U. S. Attorney for the Southern District of New York.

John K. Richards,
Solicitor-General.

No. 196. 27.

Atty. Gen.

Office Supreme Court U. S.
FILED
APR 18 1900
JAMES H. MCKENNEY,
Clerk.

Filed April 18, 1900.

In the Supreme Court of the United States.

October Term, 1899.

LI SING, PETITIONER,
v.
THE UNITED STATES.

No. 196.

MOTION TO DISMISS, OR AFFIRM, OR DISMISS OR AFFIRM,
FOR THE DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

LI SING, PETITIONER,
v.
THE UNITED STATES. } No. 195.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The petitioner was arrested on or about January 6, 1897, and, after a hearing before a United States commissioner, was ordered on June 24, 1897, to be deported as a Chinese laborer. (Record, pp. 5, 6, *et. seq.*, 38.) The Government had objected to the admission of the evidence of the petitioner and certain other Chinamen *viva voce* and by affidavit on the ground that under section 2 of the act of 1893 the facts offered must be established by the testimony of two credible witnesses other than

Chinese (pp. 8, 11, 38–42). The commissioner treated this evidence as in (p. 37), but held that under all the evidence the defendant is a Chinese laborer, and that if it were necessary to decide the Government's motion to strike out the testimony objected to, he should sustain the objection, and hold that the provisions of section 2 of the act of November 3, 1893 (28 Stat., 7), applied.

Thereupon petitioner filed his application for a writ of habeas corpus and a writ of certiorari for the purpose of reviewing the proceedings (pp. 1, 2). In this application petitioner set up the facts that he had been domiciled for many years as a resident Chinese merchant in Newark, N. J., that on or about June 22, 1893, he left this country for the purpose of temporarily revisiting China and bringing back with him his son, and with the intention of returning to this country; that before departing from this country he procured the certificate of identification prescribed by the regulations of the Treasury Department, and upon leaving China on his return had the said certificate duly countersigned by the representative of the United States at Hongkong; that upon his application for admission into this country to the United States collector, at Malone, N. Y., the latter decided that the petitioner and his son were entitled to enter and remain within the United States; and that thereupon they proceeded to Newark, the domicile and place of business of the petitioner, as aforesaid.

These writs being allowed, and returns thereto duly filed, and the cause coming before the court, after hearing it was ordered by the court that the writ of habeas corpus be dismissed, and that the petitioner be remanded

to the custody of the United States marshal for deportation under the order signed by the United States commissioner (pp. 2–6).

An appeal was taken by the petitioner to the United States circuit court of appeals (p. 46), assigning for error the holding of the court—

First. That the action of the collector in permitting petitioner to enter the United States did not bar subsequent proceedings for his deportation.

Second. That the burden of proof was thrown upon petitioner to show his right to remain.

Third. That petitioner should be deported.

The case was argued before the circuit court of appeals, and the order of the circuit court was affirmed on April 7, 1898, the decision (p. 50) holding that under the act of August 18, 1894 (28 Stat., 390), the decision of the collector of customs is a final and controlling adjudication only when adverse to the admission of an alien, citing *United States* v. *Jung Ah Lung* (124 U. S., 621), *Lem Moon Sing* v. *United States* (158 U. S., 538), and *In re Li Foon* (80 F. R., 881). Upon the question of the admissibility of the evidence of Chinese persons, the court held that, as the Commissioner excluded no evidence and decided upon the entire conflicting testimony that the defendant was a Chinese laborer, the question of the constitutionality of section 2 of the act of 1893 does not arise upon this record, and sustained the constitutionality of section 3 of the act of May 5, 1892 (27 Stat., 25), upon the authority of *Fong Yue Ting* v. *United States* (149 U. S., 698, 729), *Wan Shing* v. *United States* (140 U. S., 424), and *Wong Wing* v.

United States (163 U. S., 228), as showing that similar provisions are within the scope of the power of Congress to provide for the deportation of aliens who are deemed to be unlawfully within this country.

ABSTRACT OF RECORD EVIDENCE.

The defendant offered the certificate on which he was admitted at Malone (Exhibit A in original exhibits), to which the United States objected on the ground that the Supreme Court has held [*Lau Ow Bew* v. *United States*, 144 U. S., 47] that the certificate prescribed by section 6 of the act of 1884 (23 Stat., 105) is not applicable to a returning Chinese merchant, whose admission, it was claimed, is now governed by section 2 of the act of 1893 (28 Stat., 7; Record, pp. 6, 7). (See *Lem Moon Sing* v. *United States*, 158 U. S., 538, 540.) The defendant objected to the jurisdiction of the commissioner and the court on the ground that under the act of August 18, 1894 (28 Stat., 390), it rests with the collector finally to determine the legality of the entrance of a Chinaman; and claimed that where thus determined, the burden of proof rests upon the Government to show that the applicant was improperly admitted (pp. 6–7). His objections being overruled and motions based thereon denied, and the certificate being admitted (p. 18) only for the purpose of showing what papers were before the collector, to all of which rulings exceptions were taken, the defendant was then examined (pp. 8–10) under objection by the United States, based on section 2 of the act of 1893 aforesaid, and testified that being a resident of Newark, N. J., and

for six years a member of the firm of Sam Palmer & Co., engaged in business there and dealing in Chinese merchandise, and for a year and a half an active partner in that business, he left the United States in the summer of 1893 to go to China, procuring a week or two beforehand the certificate in evidence. A motion by the United States to strike out these statements and to exclude the testimony of the alleged senior partner of the firm (pp. 9, 11), on the ground that the act of 1893 also requires the fact to be proved by the firm's books, was granted and exception taken. On cross-examination the defendant stated that when he sold his laundry, about 1891, he took an active part in the firm's business and had never worked in a laundry since.

A witness (presumably white) testified (p. 25) that he had known the defendant between 1891 and 1893, had frequently been at the firm's shop and seen the defendant engaged there selling goods over the counter, and had himself made trifling purchases of the defendant. Another witness, apparently white (p. 27), testified that in 1889 and 1890 he had taken his washing to the defendant at his laundry in Broad street, Newark, and that afterwards, in 1892 and 1893, he had seen the defendant at the address of the firm of merchants on South Orange avenue behind the counter waiting on customers.

The defendant, recalled (p. 33), denied that he had offered money to a Government witness or to anyone else to testify that he was a merchant; stated that the name of his laundry was "John Sing," and the name was retained by the purchaser, and, being questioned to show that John Sing was not his name, but was the name of

the laundry, and was applied indifferently to all of the occupants by customers (in which line of testimony the Government did not acquiesce), he stated that among other Chinamen in the laundry called by the name of John Sing was his brother, *Li Sing;* and through the interpreter it was explained that the brother (who was then absent in China) had the same name as written in English, and as pronounced both in English and Chinese, but that the names differed as written in Chinese, had a different significance, and were further distinguished by slightly different shades of inflection in pronunciation. The defendant admitted that he knew the Government witnesses Gifford and Schenck, but denied that he knew Crowley and Wood (see *infra*), and stated in reference to Schenck's testimony that he had met him once in his (Li Sing's) brother's place (the other Li Sing, to whom it was claimed the laundry was sold in 1891), but he had not worked there; he had only visited his brother, who went to China in November, 1896 [the applicant having returned from China in August, 1896]. The affidavits of various Chinamen, including the defendant himself, of the senior partner in the firm of Sam Palmer & Co., and of a former partner of the defendant in the laundry business (p. 38 *et seq.*), are, with some variations, to the effect that the defendant had been in this country and at Newark for a number of years; had first been in partnership with his brother (who is distinguished in these affidavits as Li *Zing*), and, after an intermediate visit to China, had gone into partnership in a laundry with another Chinaman, Lee Ging, or Gang, or Gong; that in 1891 he had

sold the laundry to his brother and had never since been interested in it or been connected with it in any manner; that he had a substantial interest in the grocery business of Sam Palmer & Co. for several years, and in 1891, after selling out his interest in the laundry, had devoted all his time to the business of that firm.

The Government testimony was offered without prejudice to the objection that the defendant had failed to establish his right to be and remain in this country as a part of his own case, and it was stipulated that the defendant's testimony should be admitted subject to the Government's objections, which were to be passed upon at the end of the proceedings.

The Government witness Gifford (p. 12) identified Li Sing as the Chinaman whose picture was attached to an affidavit (Exhibit 1) taken before the witness as a State official; he knew him as John Sing; he had seen him on a great many occasions at the laundry in question, where the witness' own laundry work had been done prior to Li Sing's last departure for China (the latter several times receiving the wash himself), and on one occasion since. But the witness was not clear whether he had seen Li Sing there since his return from China. He also testified that Li Sing called on him twice and put questions to him, the import of which was whether the witness did not know that Li Sing was a member of the firm of Sam Palmer & Co. (pp. 13, 15).

The witness Crowley (pp. 15–17), a plumber, also identified Li Sing as the man whose photograph was attached to Exhibit 1. He had known him as John Sing; had seen him constantly in the laundry for six or seven years

before he went to China and at least a dozen times since; had seen washing brought there since Li Sing's return from China, and had seen him washing and ironing; had taken a plumbing bill to the laundry since Li Sing's return, made out to John Sing, and Li Sing had paid it himself. Witness also testified that Li Sing or John Sing had seen him since returning from China, and wanted the witness to swear that he knew him to be a merchant in Newark, and said, either himself or through an interpreter accompanying him, that the witness would be well paid for his services.

The policeman, Wood, testified positively (p. 20) that he had known Li Sing as John Sing for sixteen or seventeen years, and had seen him more than a dozen times ironing in the laundry since his return from China.

Chinese inspector Scharf identified Li Sing by Exhibit 1 as being present in the case therein referred to, and testified that on the 15th day of January, 1897, he went to Li Sing's laundry and saw two Chinamen at work there washing and ironing clothes, and obtained from them a list of prices which was offered in evidence and marked "Government Exhibit 2."

The witness Spaeth (pp. 28–9) knew the defendant John Sing, and had seen him washing and ironing and taking in laundry work at the laundry on Broad street. He or his sister customarily took his laundry work there, but he had only seen the defendant once in the laundry since September, 1896.

The witness Schenck, a colored man, identified the defendant positively as John Sing, and had seen him in the laundry since he came back in August, 1896, and

since or during January, 1897, and he was ironing the last time the witness saw him, though he does not remember seeing him more than once or twice since he came back.

A SUGGESTION AS TO JURISDICTION.

A point of jurisdiction is suggested at the outset which it is understood the court will consider, either in respect to its own jurisdiction or the jurisdiction below, although the point may not be made in the record nor argued by counsel. (*Lau Ow Bew Case*, 144 U. S., 47, 55; *Great Southern Hotel Company* v. *Jones et al.*, opinion delivered April 9, 1900.)

This court undoubtedly has appellate jurisdiction to determine whether a lower court had original jurisdiction (*Whittemore* v. *Amoskeag Bank*, 134 U. S., 527, 529), and, it would necessarily seem, also has appellate jurisdiction to determine whether a lower court had appellate jurisdiction, or to determine what court properly had appellate jurisdiction. The present case is one of habeas corpus, and appears to be here properly under the Lau Ow Bew ruling (ib., p. 58) by which the writ of certiorari in that case was held to have been providently issued. The question of propriety of the issue of the writ is foreclosed by the action of the court in awarding it, but the question of power to issue it is always open (*Forsyth* v. *Hammond*, 166 U. S., 506, 511).

Since by section 6 of the circuit court of appeals act that court was given appellate jurisdiction to review final decisions of the circuit courts "in *all cases* other than those provided for in the preceding section of this

act, unless otherwise provided by law," the appellate jurisdiction not vested in the Supreme Court was vested in the circuit court of appeals and the entire jurisdiction distributed. (*McLish* v. *Roff*, 141 U. S., 661, 666; *Lau Ow Bew's* case, 141 U. S., 583, and 144 U. S., 47, 56; *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S., 372, 383; *Carey* v. *Houston and Texas Central Railway*, 150 U. S., 170, 179; *The Paquete Habana*, 175 U. S., 677, 681, 683.) And since a habeas corpus case may go properly to the circuit court of appeals, and since it is not a case in which an appeal lies from that court under the last paragraph of section 6 of the act, and since the decree of that court is made final "by the effect of the section" (*vide* Lau Ow Bew's case, p. 58), although not expressly made so, therefore this case is clearly reviewable here upon certiorari, *unless* (it is respectfully suggested) the indication of the Lau Ow Bew decision (ib.), that habeas corpus cases which involve the constitutionality of a law of the United States or the construction of a treaty made under its authority should be taken direct to the Supreme Court from a district or circuit court under section 5 of the act, covers the present case.

The case does involve both these questions. Now, in proceedings upon habeas corpus the method of review is by appeal (sections 763, 764, Rev. Stat.; act of March 3, 1885, 23 Stat., 437; *In re Neagle*, 135 U. S., 1, 41, 42); and where there is a plain and adequate remedy by appeal or otherwise the court will not grant certiorari. (*In re Tampa Suburban R. R. Co.*, 168 U. S., 583.)

In view of the foregoing, it is pertinent to suggest that

the petitioner's proper course for review would have been by direct appeal to this court from the order of the circuit court affirming the Commissioner's judgment of deportation. "In *Nishimura Ekiu* v. *United States* (142 U. S., 651), jurisdiction of an appeal on *habeas corpus* directly from the circuit court was taken, as it was in *Horner* v. *United States* (No. 2), 143 U. S., 570" (*In re Lennon*, 150 U. S., 393, 399), on the ground that the constitutionality of a law of the United States was involved, and that the cases therefore fell within the classes enumerated in section 5 of the act. Hence the right of appeal from judgments on *habeas corpus* of circuit courts or district courts directly to this court still exists in all cases designated in section 5. (*In re Lennon, supra; Boske* v. *Comingore*, decision rendered April 9, 1900.)

ARGUMENT.

I.

Petitioner not entitled to return as laborer.

When this man, being a laborer, went to China in 1893, he could not obtain a laborer's certificate of identity provided for by section 4 (as amended) and section 5 of the act of 1882, and could not return to the United States as a laborer, because of the prohibition in the act of October 1, 1888 (25 Stat., 504), the constitutionality of which was sustained in the *Chinese Exclusion Case* (130 U. S., 581), even as to a Chinese laborer who had left this country before October 1, 1888, and held a return certificate under the act of 1884. After December 8, 1894, the applicant, if a registered laborer under section

6 of the act of 1892, or the amendment thereto of the act of 1893, and, if otherwise qualified under Article II of the treaty of 1894 (28 Stat., 1210), might have obtained a certificate of identity and returned to the United States. The treaty so far modifies the act of October 1, 1888 (21 Op. A. G., 68). His inability to return legally as a laborer perhaps explains the reason why he took out with him the irregular certificate (21 Op. A. G., 481; referring, however, to Chinese persons presumably not laborers entering this country for the first time) issued at the Chinese consulate at New York, and styling Li Sing a "wholesale grocer."

II.

Even assuming merchant status, his irregular certificate was wholly insufficient.

This certificate was thus irregular in form, although under the Lau Ow Bew decision the certificate of section 6 of the act of 1884 is not required of returning Chinese merchants already domiciled in the United States, and although the document might have been taken by the collector (as it doubtless was) for what it was worth as evidence; and the certificate was insufficient in substance even if Li Sing was a merchant, because his case should have been governed at the frontier by the requirement of section 2 of the act of 1893, that a merchant applicant for entrance shall establish his former status here as a merchant, "as hereinbefore defined," by the testimony of two credible witnesses other than Chinese. The fact that this requirement was imposed

after Li Sing left this country can not withdraw his case from compliance in view of the decision in the *Chinese Exclusion Case*, which invalidated laborers' return certificates previously valid; nor was the new requirement an unreasonable or an absurd exaction from a returning merchant within the Lau Ow Bew ruling, because, the law plainly demanding that such an applicant shall present the required testimony on his entrance, it is not impracticable to do so if it is possible or the evidence exists. And if it is not possible or the evidence does not exist, then the applicant has no right to enter.

III.

Collector's decision final only if adverse to admission.

The plain terms of the act of August 18, 1894 (28 Stat., 390) makes the decision of the collector final, unless reversed on appeal to the Secretary of the Treasury, only "*if adverse to the admission of such alien.*" The decision of the collector to admit is not a controlling adjudication, and judicial cognizance is no more excluded than it was in the *Jung Ah Lung* case (124 U. S., 621), under section 9 of the act of 1884. It is only the decision of the appropriate immigration or customs officers *excluding an alien* which is made final in every case unless on appeal to the Secretary of the Treasury it be reversed. (*Lem Moon Sing* v. *United States*, 158 U. S., 538, 548–9.) It is not necessary to extend the argument on this point; the language of the act and of the decisions permits no other view. (See opinion of the circuit court of appeals herein; *In re Li Foon*, 80 Fed. Rep., 881.)

The ineffective act of September 13, 1888.

The act of September 13, 1888 (25 Stat., p. 476), enacted that from and after the date of the exchange of ratifications of the pending treaty between the United States and the Emperor of China (which was signed on March 12, 1888), it shall be unlawful for any Chinese person, whether a subject of China or any other power, to enter the United States except as therein provided. Section 15 of that act repealed the acts of 1882 and 1884, "to take effect upon the ratification of the pending treaty, as provided in section 1 of this act." The treaty failed of ratification, and it has been supposed by the Executive that the act as a whole failed to take effect because the treaty was not ratified. (2 Supp. Rev. Stat., pp. 15, 141.) Some of the provisions of the act have been incorporated in later laws and some amend earlier laws; for instance, a portion of section 2 is in effect reproduced in Article III of the treaty of 1894; section 3 finds a corresponding provision in section 2 of the act of 1893; sections 2 and 4 modify and enlarge the provisions of section 8 of the act of 1882 as amended; sections 5, 6, and 7 correspond to Article II of the treaty of 1894, in connection with the Treasury regulations as to ports of reentry for laborers. (21 Op. A. G., 68; Treasury Chinese Regulations, 1899, p. 39, par. 42.)

Section 12 provides for an examination of Chinese passengers arriving on vessels and for a comparison of their certificates with the list of passengers provided for by section 4. No passengers shall be allowed to land in violation of law, "and the collector shall in person

decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury and not otherwise." Section 13 provides for the arrest of Chinese found unlawfully in the United States, and for hearing before a justice, judge, or commissioner, and for deportation when the defendant is adjudged to be not lawfully entitled to be or remain in the United States, "but any such Chinese person convicted before a commissioner of a United States court may within ten days from such conviction appeal to the judge of the district court for the district * * * "

In *United States* v. *Jim* (47 Fed. Rep., 431) the district court for the State of Washington took cognizance of an appeal by virtue of this act, and held that "every part of the act became effective from the date of its approval except the particular provisions of the first and fifteenth sections, which are specially, by the provisions contained therein, made to depend for vitality upon the contingency of the ratification, at a future time, of the pending treaty."

In the case of *Mah Wong Gee* (id., 433) it was held that "parts of the act were made to take effect on the ratification of the treaty, and the rest, including section 13, providing for an appeal, were made to take effect presently, and became at once and are now a part of the law of the subject." In *United States* v. *Chong Sam* (id., 878) it was held that section 13 and all other sections, except sections 1, 2, 4, and 15, are in force. In *United States* v. *Lee Hoy* (48 Fed. Rep., 825) it was held that sections 12 and 13 are in force. In *United States* v.

Gee Lee alias Lee Hoy (50 Fed. Rep., 271) the circuit court of appeals of the ninth circuit held that section 13 of the act is in force, but that section 12 is not in force. "Particular provisions of the act may be in force as not being within the purview thereof as declared in section 1 as follows: 'It shall be unlawful for any Chinese person, whether a subject of China or any other power, to enter the United States except as hereinafter provided.' Such is section 13 of the act * * *" In *United States* v. *Long Hop* (55 Fed. Rep., 58) it was held that section 13 of the act is in force, and also that all of the act is in force except sections 2–4 and 15. "Parts of the act were made to depend upon the ratification of the pending treaty relating to Chinese, and as that ratification has not taken place there is no field of operation for them. They are sections 2 to 4 and section 15. The law exists, but there is nothing for it to operate on. But the rest of the act, including section 13, has a field of operation."

(See also *United States* v. *Wong Dep Ken*, 57 Fed. Rep., 203, and *United States* v. *Loo Way*, 68 Fed. Rep., 475.)

It will thus be observed that section 13 has generally been held by the Federal courts which have directly passed upon it to be in force, although there is a divergence of opinion as to other sections. It seems that the Supreme Court has never passed on this question, and has never in any of the decisions relating to Chinese immigration referred to any part of the act of September 13, 1888, as in force.

The intimation of the opinion of the circuit court of

appeals in this case is that section 12 of the act which provides that the decision of the collector "shall be subject to review by the Secretary of the Treasury and not otherwise" did not take effect, because the court says: "*If this section had gone into effect* and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final." The court then passes on to the act of October 1, 1888, absolutely prohibiting the admission of Chinese laborers, and infers from the contrariety between the acts of September and October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect, citing *United States* v. *Gee Lee*, *supra*. After declining to express an opinion regarding section 13, the question generally is held not to be a living one because of the provisions of the act of August 18, 1894, *supra*, which makes final the decision of the immigration or customs officer if adverse to the admission of the alien, unless reversed on appeal to the Secretary of the Treasury.

So that the foregoing review of the act of September 13, 1888, appears to bring us to the necessary conclusion that that act is not involved in this case, because the defendant did not undertake to proceed by means of the appeal from the judgment of the commissioner provided for by section 13, but elected the remedy upon writs of habeas corpus and certiorari; and because, if section 12 of the act making, apparently, the decision of the collector in person a final determination, whether in favor of or adverse to the alien, subject only to review by the

Secretary of the Treasury, was ever in force, it has certainly been repealed and supplied by the act of August 18, 1894.

V.

Section 3 of the act of 1892; the Commissioner's finding of fact final.

Coming, then, to the actual issues, the proceedings for Li Sing's deportation were instituted under section 12 of the act of 1882 as amended by the act of 1884 (see opinion of circuit court of appeals), which provides "that no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came and at the cost of the United States after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States." * * *

It is to be noticed that where the certificate of section 6 of the act of 1884 is required as the sole evidence permissible to establish a right of entry into the United States (as, for instance, in the case of a merchant entering for the first time), and is produced, it may nevertheless be controverted, so that the law has thus, as well as by the act of August 28, 1894, reserved the right of the United States to disprove facts stated in the certificate.

The jurisdiction of the commissioner having thus attached, the case proceeded under section 3 of the act of 1892, which provides—

> That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, *unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner,* his lawful right to remain in the United States.

This section specifically applies to arrests under the act of 1892 or under the previous acts.

The relative law under section 12 of the act of 1882 as amended required deportation after the Chinese person was brought before a commissioner "and found to be one not lawfully entitled to be or remain in the United States," while the law formulated under the ineffective act of September 13, 1888, required deportation when the defendant was convicted upon hearing before a commissioner, "and found and adjudged to be one not lawfully entitled to be or to remain in the United States." And it may be pointed out here, as additional support of the contention that the decision of the collector was not final in this case, so as to make the question of the applicant's right *res adjudicata*, that in the Jung Ah Lung case the court said (124 U. S., 621): "On the contrary, the implication of section 12 [of the act of 1882] is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with."

By the act of 1892, therefore, the burden of proof has

been cast upon the Chinese person, who must establish his right to remain by affirmative proof to the satisfaction of the commissioner; and section 3 of that act applies to arrest, not only under that act, but under the previous acts.

The second objection of the defendant (under the assignments of error in the circuit court of appeals, rec. p. 46) is addressed to the constitutionality of this section of the act of 1892, his first objection being based upon the finality which he claims for the collector's decision. The latter point has been heretofore discussed, and the constitutionality of section 2 of the act of 1893 will be considered *infra*.

It is very manifest that the justice, judge, or commissioner is now made the final and conclusive authority upon the facts. The character and degree of affirmative proof must be such as to satisfy him, and his finding of the facts can not be reviewed by any other tribunal. It can not be doubted that these propositions are true in view of the language used in section 3, and equally it can not be doubted that the final determination of facts regarding the right of an alien to remain, like the right to land, may be intrusted by Congress to the courts, to judicial officers, or to executive officers; and "when the statute gives discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of these facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence upon which he acted." (*Jung Ah Lung*, 124 U.S., 621; *Nishimura Ekiu*

v. *United States*, 142 U. S., 651, 660; *Lem Moon Sing* v. *United States*, 158 U. S., 538, 544.) Surely it is as much within the acknowledged power of the legislature to prescribe the evidence which shall be received before judicial officers whom it clothes with certain authority as before executive officers.

Apart from the positive provision of the statute and its broad force, the constitutionality of which is sustained by these decisions, the general rule is that where an officer or tribunal has jurisdiction of the subject-matter and of the person, irregularities in the proceedings are not reviewable on habeas corpus, and even error in findings of fact are not subject to revision in an appellate court if there was any evidence upon which such findings could be made. Decisions below on the facts must be affirmed where they are not shown to be wrong. (*Hathaway* v. *Cambridge National Bank*, 134 U. S., 494; *Cortes* v. *Jacobus*, 136 U. S., 330; *Mackall* v. *Richards*, 154 U. S., 624; *Jaeger* v. *Moore*, id., 641; *Ponder* v. *Delauney*, id., 651; *United States* v. *Williams*, id., 652; *Groat* v. *O'Hare*, id., 660.)

> * * * the jurisdiction of the commissioner and the sufficiency of the legal ground for his action are the main questions to be decided; and this court declines to consider questions respecting the introduction of evidence or the sufficiency of the authentication of documentary proof. (*Benson* v. *McMahon*, 127 U. S., 457, *syllabus*.)

It is perfectly apparent from the record in this case that there was abundant evidence to sustain the commissioner's findings. He had competent legal evidence before him on which to exercise his judgment as to whether

the facts were sufficient to establish a violation of law by the defendant. (*Cortes* v. *Jacobus, ut supra*, p. 334.)

As was indicated by the opinion of the circuit court of appeals, the constitutionality of section 3 of the act of 1892 is conclusively settled in favor of the Government by the decision in Fong Yue Ting's case. The general doctrines reaffirmed in that case, and the exact points decided, to which reference is made *infra passim*, fully sustain the contention that the law now being discussed is also an exercise by Congress of an inalienable right of sovereignty in a manner consistent with the Constitution.

It is not possible to doubt, in view of the decisions, that Congress has full power and discretion if it sees fit to exclude any class of Chinese persons, and *a fortiori* to impose the conditions on which they may enter and the method of procedure and the rules of evidence by which they may establish their right to enter.

The court invokes (149 U. S., 712) the famous statement of Chief Justice Marshall in the case of *McCulloch* v. *Maryland*, as to the liberty of choice by Congress of the means to carry out its power, namely: "As long ago said by Chief Justice Marshall, and since constantly maintained by this court, 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people;'" * * * citing also later cases which illustrate the doctrine.

The opinions in *Wan Shing* v. *United States* (140 U. S., 424), in which also "the evidence offered to show that

the petitioner was a merchant was weak and unsatisfactory" (p. 427), and in *Wong Wing* v. *United States* (163 U. S., 228, 231, 233, 234, 235), affirming again the broad principle of sovereign right enunciated in the previous cases, are strongly suggestive upon the extent of the power of Congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully within the country and to commit the determination of this question to judicial or other officers as the sole and exclusive judges thereof.

The writ of habeas corpus obtained in this case was not that provided by section 5 of the act of 1892, because that provision applies to a Chinese person seeking to land in the United States to whom that privilege has been denied; that is, to a *collector's* refusal to admit. It was doubtless in view of the plain scope of section 3 of the act of 1892 that the circuit court of appeals held in effect that the only questions which can be presented upon this writ of habeas corpus relate to the jurisdiction of the commissioner and the legality of the order of deportation. This is in accordance with the general rule, also, that in proceedings upon habeas corpus the facts found below upon which the writ was founded may not be reexamined or controverted in the appellate court. (*Ex parte Lange*, 18 Wall., 163; *Ex parte Curtis*, 106 U. S., 371; *Ex parte Caroll*, id., 521; *Ex parte Hung Hang*, 108 U. S., 552; *Benson* v. *McMahon*, 127 U. S., 457; *Cortes* v. *Jacobus*, 136 U. S., 330; *Horner* v. *United States*, 143 U. S., 207.)

And this certainly seems to be true as applied to the present case, and in view of the language of the statute, and is consistent with the language of Mr. Justice Miller

in the opinion of the court in *In re Neagle* (135 U. S., 1, 42), to the effect that proceedings for review on habeas corpus being by appeal under the statutes, the entire case on both law and facts is to be reconsidered *except when specially provided otherwise*. Now, the act before the court does clearly in effect specially provide that the evidence must be sufficient to satisfy the commissioner and may not be reexamined or controverted.

Apart from the commissioner's finding of fact upon the conflicting testimony that the defendant was a laborer, it was within his competency to hold, in view of the provisions of section 2 of the act of 1893 requiring a Chinese applicant for entrance into the country who alleges that he was formerly engaged here as a merchant to establish his status by the testimony of two credible witnesses other than Chinese, that the applicant had not established by affirmative proof, to the commissioner's satisfaction, his right to remain. In other words, it was equally within the commissioner's function and authority to hold conclusively as matter of fact that the applicant was a laborer, and therefore could not land at all, not being within the conditions and protection of the treaty of 1894, or was a returning merchant who had not presented the required character and amount of proof.

VI.

The commissioner's finding sustained by the evidence; section 2 of the act of 1893.

But the finding was abundantly justified by the record evidence. The Government does not need to point out

the obvious desire and concerted endeavor of the Chinaman, his associates, and his other witnesses to sustain the merchant classification on improbable claims and assertions, nor to emphasize their strong interest on that side of the question. Nor does the Government need to suggest the imperfect conception entertained by Chinamen of the nature and sanctity of an oath under our jurisprudence (*Chae Chan Ping's* case, 130 U. S., 581, 598), which is illustrated by Li Sing's repeated denial of sufficiently established facts regarding acquaintance and conversations with other witnesses, calling forth in one instance (p. 16) the commissioner's caution as to perjury. The statements, for instance, as to Li Sing's brother, to whom the laundry had been sold and who might have been mistaken for him, and who had to an English ear identically the same name, and whose absence in China at the time of the hearing was not proved but only asserted, are so improbable that they bring to mind the facts and the decision in *Quock Ting* v. *United States* (140 U. S., 417), in which it was held that the uncontradicted evidence of interested witnesses to an improbable fact does not require judgment to be rendered accordingly. Here the particular statements just referred to were not contradicted directly, but the case of the applicant as a whole was repeatedly contradicted and plainly disproved.

The two witnesses, Shafer and Anderson (pp. 35, 37), apparently white, who testified in Li Sing's behalf, stated nothing which was not consistent with his being merely a laborer or an employee in the merchant firm, and continuing, nevertheless, his ordinary avocation as laundryman.

As the commissioner considered the Chinese testimony notwithstanding the Government's objection (although Nos. 3 and 6 of the new assignments of error, page 2, appellant's brief, strangely deny this), the constitutionality of section 2 of the act of 1893, as the circuit court of appeals said, is not raised by this record; and the consideration of that question becomes therefore merely abstract and academic. Nevertheless, it may be suggested that the constitutionality of this law is sustained generally by the entire line of Chinese decisions and the related decisions of the court. The United States as a sovereign nation may exclude or expel aliens, and *a fortiori* may regulate their coming and impose conditions and terms upon which they may be admitted. This proposition is sustained by the decision in the *Chinese Exclusion* case, *supra*, holding that an applicant (in that case a laborer) might be absolutely deprived by a subsequent act of Congress of rights already granted. It is sustained by the case of *Nishimura Ekiu* v. *United States* (142 U. S., 651, 659), which held, adopting the reference to that case in the *Lem Moon Sing Case* (158 U. S., 543), that the United States has the power "to forbid the entrance of foreigners within its dominions or to admit them only upon such terms and conditions as it may see fit to prescribe." It is sustained by the *Lem Moon Sing Case* (id., 547): "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country * * * is settled by our previous adjudications."

It is sustained more particularly by those passages in the decision in *Fong Yue Ting* v. *United States* (149 U S.,

698, 729) which discuss section 6 of the act of 1892 and the provision therein that a Chinese laborer who neglects to register shall establish to the satisfaction of the judge before whom he is taken, by at least one credible white witness, that he was a resident of the United States at the time of the passage of that act, namely: "[This provision] is within the acknowledged power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government." The court then proceeds to point out that the competency of all witnesses rests on acts of Congress, which Congress may in its discretion modify or repeal, and to point out the reason, resting in the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping's case, for requiring a Chinese alien thus to prove the facts of his residence here—that the admission under former acts of Chinese testimony to prove similar facts "was attended with great embarrassment from the suspicious nature in many instances of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath." (130 U. S., 598.) And the court (in the Fong Yue Ting case, *ut supra*) also points out the requirement in the naturalization laws that applicants for naturalization must prove their residence by the oath or affirmation of citizens of the United States.

The conclusion of the court in that case was as follows:

> The question whether and upon what conditions these aliens shall be permitted to remain within the United States being one to be determined by the

political departments of the Government, the judicial department can not properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

VII.

The continuing necessity for exclusion of Chinese.

It might be suggested by the other side that our Chinese laws are unnecessary and unjust; that in the passage of time the aspect of the question has changed; that the evils consequent upon the admission of Chinese into this country are much lessened, and that considerations of high moment fairly call for a relaxation of the rigors of the law; but the laws are still on the statute books to be enforced, and investigation of the facts shows that the evils still exist and are not decreasing; that the devices to evade the law and the efforts to defy it are just as numerous and persistent as in former years; and that the language of Mr. Justice Field, a portion of which has been quoted in this brief, is still applicable to this subject. (112 U. S., 565–568, 569.) See also the similar suggestions in the *Chinese Exclusion* decision (130 U. S., 606), in connection with which, in the earlier case, the learned justice (112 U. S., 567, 570) called attention to the real lack of mutuality between the two nations in respect to reciprocal privileges, immunities, and exemptions, notwithstanding the stipulations of the treaties. While the exclusion laws have been in operation for a number of years since the first of the Chinese decisions

of the court, the conditions existing among "the unnumbered millions on the opposite shores of the Pacific," and the very different conditions existing in the different and higher civilization here (as we think our civilization is) still exist and continue to require now, as they required then, the enforcement of the restrictions upon this immigration. Further, the statement made by the same learned justice in the dissenting opinion in the *Fong Yue Ting* case (149 U. S., 751), though relating to Chinese laborers, is applicable also to numerous Chinese persons who profess to be merchants or of other occupations and not laborers, namely:

> [They] came into the country by water and by land; they came through the open ports and by rivers reaching the seas, and they came by way of the Canadas and Mexico. New means of ingress were discovered, and in spite of the vigilance of the police and customs officers, great numbers clandestinely found their way into the country. Their resemblance to each other rendered it difficult and often impossible to prevent this evasion of the laws.

Among the results of this resemblance are the claims, notoriously made in numerous instances and often successfully, that the applicant is returning to this country, although he may never have been here before; or is a returning merchant, when he is a returning laborer who is not entitled to reenter; or that he is a citizen of the United States by birth. And it is notoriously part of the means of evasion of the law that evidence appropriate to each case is manufactured, so to speak, either by means of the false testimony of pretended fathers, or by

means of fabricated, manipulated, or altered certificates, different photographs being substituted, and other similar means adopted to defraud, all of them promising a likely chance of success because of the racial resemblance and the difficulty in detecting imposition.

It has been the experience of the Treasury Department and the Department of Justice that the same devices which were in use in earlier days and which are indicated in the opinions of the court are still persistently used to introduce Chinese into this country contrary to law.

The applicants to land or to enter the country now, just as much as in the days of which Justice Field was speaking (112 U. S., 578), whether or not they ever before saw our shores, "yet will produce a multitude of witnesses to establish their former residence, whose testimony can not be refuted and yet can not be rejected," unless the constitutionality of the existing laws is sustained.

VIII.

The recent cases of Ping Yik and Pin Kwan.

There is another point to be made in the case. The arrangement appears to have been that Li Sing paid the "merchant" firm of Sam Palmer & Co. $1,200 for his interest, or contributed that sum to the capital (pp. 38, 40), and that Li Sing received from the firm during the last year in which he lived in the United States (apparently before his departure for China in June, 1893) a little over $200, exclusive of his regular salary, which

was $30 a month (p. 10). This arrangement suggests that he had invested money in the firm's business, but at most was only a clerk or some other of the variety of "merchant's assistants," such as "purchaser and seller," "assistant accountant," or "trader," as the attachés of those firms are variously known.

Now, section 2 of the act of November 3, 1893, also provides a definition of the term merchant which "shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise at a fixed place of business, *which business is conducted in his name*, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."

The cases of the *United States* v. *Pin Kwan* and the *United States* v. *Ping Yik*, although the applicants there had entered the country for the first time and were not returning, illustrate some of the features of the present case. The cases have not yet been reported, and the decisions are given in an appendix to this brief. The facts, without dispute, were that Pin Kwan had entered the country at Buffalo, N. Y., in October, 1897, upon a certificate under the act of 1884, describing him as an "assistant accountant." He was arrested in March, 1899, as a Chinese person not lawfully entitled to remain in the United States. His certificate was incomplete and defective in that it did not state, in addition to other matters as required by the act of 1884, the nature, character, and estimated value of the business carried on by him prior to the time of his application. The evidence

was that he had an interest in the stock of goods of the firm of Quong Sing Lung & Co., at Buffalo, and had been attending to their business, keeping the books and selling goods, and that he had not done anything else since his arrival in the country.

The certificate of Ping Yik (who entered the country and was arrested at the same time as Pin Kwan) described him as a "purchaser and seller;" was also defective in the respects stated, and the evidence as to him showed that he had an interest of $1,000 in the same company, for the use of which he was to receive $40 per year and $30 per month for his services. He had bought merchandise in China to send to Buffalo. He stood behind the counter and sold goods in Buffalo. But while the Chinese evidence was that he never worked in a laundry, the two Government witnesses testified that they had seen him working in a Chinese laundry at Buffalo, starching and washing clothes.

The United States contended that both of the applicants were laborers; that they were not merchants within the statutory tests, because their names did not appear in the firm designation; that their certificates were fatally defective; and that, not being merchants upon the designations given them in their own certificates, they were not entitled to admission to this country, even if not laborers, because they were not expressly included in the exempt classes, the Government's theory being that the policy dictating the treaties and laws in reference to Chinese is not that all Chinese may enter this country who are not expressly forbidden, but that only those

may come in who are expressly allowed. The Government cited upon the various contentions the following cases among others: *United States* v. *Yong Yew*, 83 Fed. Rep., 832 (in which the applicant appears to have been a laundryman with a substantial interest in a Chinese grocery); *United States* v. *Chung Ki Foon*, id., 143; *United States* v. *Ah Fawn*, 57 Fed. Rep., 591; *Lai Moy* v. *United States*, 66 Fed. Rep., 955; *United States* v. *Chu Chee et al.*, 87 Fed. Rep., 312; 21 Op. A. G., 5 (holding that "a Chinese person does not bring himself within the statutory definition of merchant unless he conducts his business either in his own name or in a firm name of which his own name is a part." See also *Mar Bing Guey* v. *United States*, 97 Fed. Rep., 576); *In re Quan Gin*, 61 Fed. Rep., 395 (which was the case of a returning Chinaman who claimed to be a merchant, and in which it was held that such a person must be excluded when it appears that the business was conducted under a firm name of which his own name was not a part); 21 Op. A. G., 6.

It was contended by the Government that even where unskilled manual labor, or manual labor in a laundry, was not done, the work of a clerk or similar employee in a Chinese mercantile firm or grocery was manual in character, although it might be skilled manual labor; that it is a common practice for Chinese in this country, as well as other people, to invest money in some mercantile pursuit, and at the same time become clerks or other employees of the merchant in whose business they

have invested their small capital; but that such a circumstance does not in any sense constitute the employee a merchant. And it may be observed here that the development of this practice among the Chinese in this country has produced many firms with a phenomenal number of "partners," and such firms in many cases have been shown to be merely confederated agencies for introducing into this country Chinese persons who have no right to enter or whose right to enter is very doubtful.

In the Pin Kwan and Ping Yik cases the United States commissioner ordered the defendants to be deported, and the district court for the northern district of New York (Coxe, J.) reversed the order of the commissioner and remanded the causes, with instructions to discharge the defendants, on the ground that the defendants were merchants, even within the strict definition of the act of 1893; that it was not necessary that their names should appear in the firm designation; that they had done no manual labor since they had been in this country, and that a Chinese person, not a laborer, who has come here with a certificate properly signed and viséd, and after examination has been permitted to enter the United States, and has engaged in business here as a merchant for seventeen months, can not, in the absence of fraud, be deported upon the ground that the certificate is incomplete and defective in matters of nomenclature and description, the court perceiving no difference worthy of remark between the facts in the two cases.

It will be observed (see Appendix) that the circuit court of appeals found that the certificates failed to conform

to the requirements of the statute in respect to the omission to state the nature, character, and estimated value of the business; that the admission of the defendants by the customs officers did not constitute an adjudication, and was not to be construed into an estoppel of the Government in the exercise of its power to exclude or deport aliens. "The defendant, so far as the proof shows, is in fact but a clerk and bookkeeper or assistant accountant in the employ of the company, who sometimes sells its goods and keeps its books. He is not a merchant, but a skilled manual laborer, and as such liable to deportation." And the court notes the fact that in the Ping Yik case the defendant had been engaged in laundry work since his entry, and in both cases reversed the decision of the district court and ordered deportation.

It seems, therefore, as the United States contends, that an "assistant accountant" or "purchaser and seller" is not to be included among the exempt classes as a kind of merchant. The applicant here, at the most, was obviously nothing more than a clerk or other such employee in the firm of merchants, which puts him into the classification of skilled manual laborers, and therefore, not being a registered laborer, is not entitled to be in this country at all, upon the general broad ground that he is not among the exempt classes, even if his allegations as to his connection with the firm are taken as verity.

It has seemed worth while to bring these recent cases to the court's attention by this somewhat lengthy review in order to show how claims not dissimilar to the one made here have been disposed of, after elaborate argument

and careful consideration by a circuit court of appeals. Although the applicant here is not entering for the first time, but claims to be a returning merchant, the argument of the Government is not only that he is not a merchant at all but a laundryman and laborer, but that so far as there is any color to the claim of merchant character the undoubted weight of decisions is against the applicant, and shows that such an interest in a merchant firm as he alleges is merely that of clerk or employee, and constitutes him a skilled manual laborer and nothing else. Even if a clerk should not be regarded as a "skilled manual laborer," which is included in the word "laborer" (section 2, act of 1893), he is not a merchant nor among the other exempt classes, and therefore is not entitled to admission.

(P. S.—Since writing the above it is learned that an application will be made to bring the Ping Yik and Pin Kwan cases before this court for review.)

IX.

An underlying question—Assuming a certain connection of Li Sing with the merchant firm.

The United States stands in this case upon the conclusive finding of the commissioner and the record evidence showing that Li Sing is a laborer. But let it be admitted, for the sake of argument, that he is neither a skilled nor unskilled manual laborer (section 2, act of 1893), and let the allegations on his behalf as to his connection with the merchant firm be taken as true, then we say that he is not a merchant under the definition of the

act of 1893, as construed by the decisions heretofore referred to; that he is merely a clerk or other similar employee of the firm, and, being that, and not being a registered laborer, protected as to return by the treaty of 1894, he is entirely without right to remain in the United States.

Let us examine, then, the fundamental question as suggested by the cases referred to in the last section of the brief, the question, namely, whether any Chinese person may enter and remain in the country unless he is expressly permitted by the laws to do so. The theory of applicants generally is that, while the coming of all Chinese persons may be regulated, as by the certificate requirements, all Chinese persons who are not laborers are entitled to come; while the theory of the Government is that the laws plainly indicate the policy and rule to be, not that all Chinese may enter this country who are not expressly forbidden, but that only those may do so who are expressly allowed (opinion of the Attorney-General dated July 15, 1898, printed in the appendix to this brief).

The treaties with China of 1844 (8 Stat., 592) and of 1858 (12 Stat., 1023) refer only to the rights and privileges of merchants and other citizens of the United States in China, and not to Chinese subjects in this country. The additional articles to the latter treaty, concluded in 1868 and thereafter duly ratified (16 Stat., 739), introduced for the first time the notion of reciprocal rights granted to the citizens or subjects of the two countries. Article IV declares that citizens of the United States in China and Chinese subjects in the United States shall

enjoy entire liberty of conscience. Article V recognizes the inherent right and mutual advantage of free and voluntary migration of the citizens and subjects of the two nations, and reprobates the evil theretofore known of any other than an entirely voluntary emigration. Article VI accords mutually and reciprocally (to American subjects visiting or residing in China and to Chinese subjects visiting or residing in the United States) the privileges, immunities, and exemptions, in respect to travel and residence, of the most favored nation, withholding the right of naturalization. And Article VII, as one of these privileges, confers reciprocally the benefits of the public educational institutions of the two countries, and grants the right to establish and maintain schools on the part of the members of each nation in the country of the other.

The development of these treaty stipulations is carefully reviewed in the opinion of the *Chinese Exclusion Case* (130 U. S., 581, 590, *et seq.*). The stipulations suggest, especially by the phrase in Article V of the treaty of 1868, "for purposes of curiosity, of trade, or as permanent residents," from which the permissive classification of the later treaties, presently to be referred to, seems to have been expanded, that they contemplate Americans in China rather than Chinese in the United States; and the earlier treaties suggest the original bearing and force of the term *merchant*, as applied to the type of western merchant of large dealings and high character in the East Indian and oriental trade, or to the similar type of merchant of the Orient, in contrast with the deterioration of the term among the Chinese

to-day in this country (in order to bring themselves within the law), by which every Chinese corner grocery is a firm of "merchants," although the establishment is often merely an adjunct to a laundry, and although even when not so it is often a means and cover for introducing Chinese illegally into this country.

The stipulations of these treaties also recall the remarks of Mr. Justice Field already referred to respecting their lack of mutuality, because the burden of the earlier treaties was to restrict and hedge about entrance into China for commercial purposes in accordance with the immemorial policy of the Empire, and although any grant of privileges was a concession from the former prohibition of all intercourse, and the privileges of foreigners (irrespective of treaties) have been enlarged and the restrictions curtailed steadily until the present day, the import of all the rights granted to us was to guard jealously the Empire from the intrusion of foreigners beyond defined limits, and to prevent free commercial access to the Chinese territory. In other words, the process with the two nations has been exactly opposite, in both cases, no doubt, in obedience to underlying natural laws of inevitable progress and necessary protection, respectively; that is to say China, starting from a condition of absolute separation from and antagonism to foreigners has gradually and cautiously removed a part of the complete prohibition to intercourse. The United States, on the other hand, starting from the point of substantially complete absence of immigration restrictions, on the ground that it was the right attitude and policy for this nation, because

of its fundamental principles, to invite freely all peoples who were oppressed or retarded in their progress to settle in this country, has found it necessary in the passage of time to withdraw that open welcome and to apply, for certain well-known reasons in the Chinese case and for similar reasons in reference to other undesirable or dangerous immigration, numerous restrictions and bars.

The treaty of 1880 (22 Stat., 826) in the preamble (Art. I) declared that the "Government of China agrees that the Government of the United States may regulate, limit, or suspend, * * * but may not absolutely prohibit" the coming to the United States or residence therein of Chinese laborers. "The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." Article II provided that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." This treaty presents a contrast with the earlier treaties for the reverse reason, namely, because it applies only to Chinese in the United States and not at all to Americans in China.

Although the first article declared that other classes of Chinese than laborers were not included in the limitations, the second article declared expressly and specific-

ally that the Chinese subjects who might go and come of their own free will and accord, besides the laborers who were then in the United States, were those proceeding to the United States as teachers, students, merchants, or from curiosity. This in itself must be held to define and limit the exception or exemption in the first article. It shows clearly and definitely the intention of the high contracting parties, and points out, by a phrase without doubt carefully studied and agreed upon, those whom the Chinese Government desired to protect and to embrace in the exemption of the first article. And if this argument in itself is not considered sufficient, the question is then presented whether, since the clear and express right of Chinese laborers under Articles I and II was disregarded and absolutely denied by the act of October 1, 1888, on the ground of sovereign power and national safety, the later laws now to be discussed have not manifestly had precisely the same effect upon the supposed broad exemption in favor of classes of Chinese persons other than laborers.

For instance, section 6 of the act of 1882, which was an act to *execute* treaty stipulations relating to Chinese, in its original form as well as amended by the act of 1884, refers to "every Chinese person other than a laborer who may be entitled by said treaty [that of 1880] or this act to come within the United States." Why was this relative clause describing and limiting every Chinese person other than a laborer necessary to be inserted if all such Chinese persons without exception were entitled to enter the country? The inoperative act of September 13, 1888, indicates that in the mind of the legislature under the

language of the treaty of 1880, and the acts of 1882 and 1884, the view of the Government is correct, because the provision of section 1 is that "it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States except as hereinafter provided," and then in section 2 it is declared that Chinese officials, teachers, students, merchants, or travelers for pleasure or curiosity shall be permitted to enter the United States. Section 3 of that act (and see also section 15 of the act of 1882 as amended) declares "that the provisions of this act shall apply to *all persons* of the Chinese race, whether subjects of China or other foreign power, excepting Chinese diplomatic or consular officers and their attendants." * * *

Thus the inoperative act of 1888 gives the final form of the permissive phrase and that is the form adopted in Article III of the treaty of 1894, which provides "that the provisions of this convention shall not affect the right at present enjoyed of Chinese subjects being *officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers,* of coming to the United States and residing therein." This article of the treaty (which is, of course, a law) undoubtedly states the rule of the case, and by the plain force and meaning of the terms used as agreed upon and adopted by both Governments, a Chinese subject, to be entitled to admission into this country, must not only not be a laborer, but must be an official, teacher, student, merchant or a traveler for curiosity or pleasure. These terms all seem clear and definite, except possibly the term "officials,"

which appears necessarily to refer to officials of the Chinese Government, but so far as can be discovered has received no authoritative definition, either in the proceedings to negotiate the treaty or in subsequent laws and decisions.

We can not perceive any reason to doubt that the well-known maxim *expressio unius est exclusio alterius* applies to this matter. If all Chinese persons other than laborers are to be admitted, why affirmatively express the classes who enjoy the right? If an actor, or an artist, or a dentist, or a doctor may be admitted, why were not such classes, either under those names or under some more general description, included, as well as students or merchants? A trader, or an assistant to a merchant, or a clerk, or an accountant is not a merchant. Are such Chinese persons therefore entitled to admission? We think it is evident that such a broad and universal right, opening the doors to all Chinese persons except those who are either skilled or unskilled laborers, was never intended, in view of the dangers suggesting the exclusion laws and the purposes for which they were enacted. In other words, laborers are particularly and by mandatory provisions excluded, but so, by the effect of the treaties and legislation, are all others not affirmatively allowed to enter.

Section 6 of the act of May 5, 1892, authorizes a certificate of residence to be issued to a Chinese person other than a laborer having a right to be and remain in the United States. This is a very significant provision and clearly indicates the possibility of the presence in the United States of Chinese persons not having a right to

be and remain therein, although they are not laborers. This provision remains in that section as amended by the act of 1893; and the act of May 5, 1892, continues in force for a period of ten years all laws prohibiting and regulating the coming into this country of Chinese *persons* and *persons* of Chinese descent; it does not only prohibit the coming of Chinese *laborers*.

The classes named in Article III of the treaty of 1894 are entitled to admission upon producing a proper certificate. The undefined classes lying between (so to speak) the class of laborers and the expressly permitted classes are not by inference included in the latter, but are by necessary implication included in the former. At least they are without right to enter, although not expressly forbidden, because they are not expressly allowed. Any other view of the case fails to consider the Chinese treaties and exclusion laws and the progressive intention and scope thereof. A well-defined doctrine justifies the contention that the policy of the Government, being against the admission of Chinese, treaty provisions making exceptions should not be expanded by implication to classes not falling within the plain scope of the language used. "The title and terms of exclusion of the act approved May 5, 1892, indicate that *the scope and purpose of the act are to permit only such persons to enter and remain in the United States who are expressly designated as being entitled to the privilege.*" (*United States* v. *Chu Chee et al.*, 93 Fed. Rep., 797.)

In *United States* v. *Ah Fawn* (57 Fed. Rep., 591), arising and decided before the ratification of the treaty of

1894, negotiations between the United States and China leading up to the treaty of 1880 are carefully investigated, and it is shown that the United States commissioners in a communication to Mr. Evarts, then Secretary of State, stated that the negotiations intentionally did not define with precision exactly what the negotiators on both sides understood by Chinese laborers, and they claimed that the Chinese Government agreed that in Article II of the treaty of 1880 "they did by exclusion provide that nobody should be entitled to claim the benefit of the general provisions of the Burlingame treaty (1868), but those who went to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity." "The history of the negotiations clearly shows that throughout them the United States commissioners insisted that the words 'Chinese laborers' should include all immigration other than that for teaching, trade, travel, study, and curiosity." (See also Senate Doc. No. 148, Forty-seventh Congress, first session; Vol. V of that session, 1881–82.)

> In my opinion the words "Chinese laborers," as used in section 1 of the act of November 3, 1893, refer not only to those actually engaged in manual labor at the date of the passage of that act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, *and those who are not officers, teachers, students, or travelers for curiosity within the* meaning of the treaty of September 17, 1880. (Judge DeHaven in *United States* v. *Chung Ki Foon*, 83 Fed. Rep., 143.)

The concluding paragraph of the opinion in the *Wan Shing Case* (140 U. S., 424), stating the result of the

legislation to be that no Chinese laborer shall be permitted to enter the United States or to return after having departed, and "that all other persons of that race except those connected with the diplomatic service" must produce the proper certificate showing their right to enter, is by no means inconsistent with the Government contention that only such other persons of that race *as are expressly entitled to enter* are included in the permission. In other words, the significant phrase may properly be viewed as meaning *all other persons of that race who are entitled to enter*, etc.

The executive decisions are in accordance with this view. In addition to the opinion of the Attorney-General of July 15, 1898, appended to this brief, the following executive decisions and opinions take the same ground: Syn., Dec. 14, 877, 18, 575, 19, 677, 20, 474, 20, 893; 21 Op. A. G., 5; Op. A. G. of November 3, 1898; Op. S. T., July 16, 1895; id., April 17, 1896; id., November 2, 1897; id., November 4, 1897; id., March 1, 1899; id., April 3, 1899.

Applying these principles to the present case, we maintain that if this man is a laborer he must of course be deported, because he has not been registered and is not within the permission to return granted by the treaty of 1894; and even if it should be conceded that he is not a laborer at all, he is nevertheless not entitled to remain here, because he is plainly not a merchant as defined by the law. His alleged connection with the merchant firm in which he claims a moderate interest by investment, stating that he received monthly wages, or salary, shows

that he was merely some sort of clerk, or salesman; as such he does not fall within any of the classes permitted by the laws, including the treaty of 1894, to enter this country, and therefore is without right to remain here and must be deported.

On the whole case and the record it is therefore respectfully submitted that the judgment of the circuit court of appeals herein should be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF UNITED STATES v. PIN KWAN.

LACOMBE, Circuit Judge:

On March 17, 1899, complaint was duly made under oath charging that Pin Kwan on October 27, 1897, "did unlawfully come into the United States from the Empire of China, the said Pin Kwan being then and there a Chinese person and laborer, and not being a merchant or diplomat, or other officer of the Chinese or any other government, and without producing the certificate required of Chinese persons seeking to enter the United States, and that he is not entitled to be or remain within the United States." There is no contention that there was any error in the procedure followed by the United States commissioner, which appears to be that prescribed in section 12 of the act of 1882 as amended by the act of July 5, 1884 (23 Stat., p. 115) and in section 13 of the act of September 13, 1888 (25 Stat., p. 476).

A brief history of the treaties with China dealing with the question of immigration into the United States and of the legislation subsequent thereto will be found in *United States* v. *Ah Fuen* (57 F. R., 591). It will not be necessary to examine into the details of the several exclusion acts. Five years before defendant's entry into this country Congress had passed the act of May 5, 1892 (27 Stat., p. 25), the first section of which provides that

"all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act." Among the laws then in force were these: The act of May 6, 1882 (22 Stat., p. 58), as amended by act of July 5, 1884 (23 Stat., p. 115), section 1, which provided that "from and after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States * * * is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

The treaty with China of November 17, 1880 (22 Stat., p. 826), provided in Article II: "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord," etc. The sixth section of the act of 1882, as amended by the act of 1884, *supra* provided: "That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age,

height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying shall be a merchant said certificate shall, in addition to the above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish. * * * [After providing for a visé of said certificate by a diplomatic or consular representative of the United States at the port or place of departure the section concludes as follows:] "Such certificate viséed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

Section 15 of the said act of 1882 as amended by the act of 1884 provided "That the provisions of this act shall apply to all subjects of China, and Chinese whether subjects of China or any foreign power; and the words Chinese laborers wherever used in this act shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining."

All these provisions of statute were reenacted and

continued in force by the exclusion act of May 5, 1892, *supra*. Subsequently and prior to defendant's entry the convention of December 8, 1894 (28 Stat., p. 1210), was entered into by the United States and China, the third article of which provides:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided, viséed by the diplomatic or consular representative of the United States in the country or port whence they depart."

Finally, the act of November 3, 1893 (28 Stat., p. 7), was passed, containing the following:

"SEC. 2. The word 'laborer' or 'laborers,' wherever used in this act or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The certificate which defendant procured before he left China reads as follows, the material parts only being given:

"This certificate is issued * * * to Ng Pin

Kwan, a Chinese person 'other than a laborer,' who is about to go to the United States. * * * Name of permitted person in his or her proper signature. Full name, individual, Pin Kwan; family, Ng, tribal ———. Title official rank if any ———. Age, 25. Height, feet, 5; inches, 3¾. Physical marks or peculiarities, scar on forehead. Former occupation or profession, assistant accountant. Present occupation or profession, assistant accountant. Where pursued, 82 Wing lok street, Hongkong. When, 1892 to 1897. For how long, five years. Place of residence, Hongkong. Who is going to Buffalo, N. Y., to join Quong Sing Lung & Co., 500 Michigan street, and attend the business of the said company."

It is manifest that this certificate fails to conform to the requirements of the statute, for, although defendant claims that he applied as a merchant the certificate wholly fails to "state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application" Evidently a printed form which had been prepared for a person other than a merchant was used. Defective though it was, however, it was signed by the representative of the Chinese Government, was viséd by the United States consul at Hongkong, and accepted by the Government officers as sufficient proof of right to enter the United States when presented by defendant upon his arrival at Buffalo. These facts do not constitute an adjudication, nor can they be construed into an estoppel of the sovereign exercising its political power to exclude or deport aliens. Nevertheless, if defendant were in fact entitled to come here, the courts might be astute to find some way to avoid merely formal defects in his certificate. But the fundamental difficulty is that defendant was not entitled to entry when he came here, nor is he entitled to remain, even if his certificate were correct in form, the

statute *supra* providing that the certificate may be controverted and the facts therein stated disproved by the United States authorities.

Upon the hearing before the United States commissioner the testimony of a Chinese person was offered on the part of defendant and received under the objection of the district attorney. This was error. The statute, *supra*, expressly provides that the certificate "shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States." But the testimony thus improperly received was insufficient. Young Chuck testified that he, the witness, has carried on a general merchandise business in Buffalo for seven years—evidently in connection with the Quong Sing Lung Company, since he signed the lease for said company. The company carries a stock of tea, wines, tobacco, clothing, etc., worth about $8,000, and insured in the name of the company for $5,000. He further testified that since his arrival Pin Kwan has lived at the stores of the company, "attends to the business, keeps the books, and sells goods," and that "he has an interest in the stock of goods and has had ever since he came here;" but what that interest is does not appear. This does not bring him within the definition of a merchant prescribed by the statute, there is nothing to show that he is engaged in both buying and selling, and certainly the business is not conducted in his name. The circuit court of appeals in the ninth circuit has held that the statute is to be so construed as to eliminate the clause expressly inserted by Congress, "which business is conducted in his own name," whenever the interest of the merchant is "real and appears in the business and partnership articles in his own name." Without now expressing an opinion as to the soundness of so much of that decision as applies the doctrine laid down in *Church of Holy Trinity* v. *United States* (143 U. S., 457), to ex-

punge from a statute words seemingly inserted with careful intention, it is sufficient to say that there is not a scintilla of evidence in the case at bar to show that Pin Kwan has an interest in the Quong Sing Lung Company, which is real, and appears in the business and partnership articles in his own name. The defendant, so far as the proof shows, is in fact but a clerk and bookkeeper, or assistant accountant in the employ of the company, who sometimes sells its goods and keeps its books. He is not a merchant, but a skilled manual laborer, and as such liable to deportation.

The decision of the district court is reversed and deportation ordered.

OPINION OF THE CIRCUIT COURT OF APPEALS IN THE CASE OF UNITED STATES v. PING YIK.

PER CURIAM: The facts in this case are substantially the same as in the case of Pin Kwan, decided to-day. There is, however, some testimony by the deputy United States collector and by the deputy marshal that the defendant has been engaged in laundry work since his entry.

Decision reversed and deportation ordered.

OPINION OF THE ATTORNEY-GENERAL, JULY 15, 1898.

DEPARTMENT OF JUSTICE,
Washington, D. C., July 15, 1898.

The SECRETARY OF THE TREASURY.

SIR: I have the honor to acknowledge the receipt of your communications of June 8, June 27, and June 28, with their various inclosures, relative to the admission into this country of certain Chinese persons known as "traders," under a certain form of certificate framed by the United States consul at Canton, China. The papers

submitted present, in effect, the question whether the persons referred to are entitled to admission to this country upon presenting a certificate actually or substantially in accordance with the requirements of the act of July 5, 1884, having in view the provisions of the treaty of December 7, 1894, upon the subject, relative to which question you request my opinion. It is understood that the Chinese persons involved seek admission to the United States for the first time.

The language of section 6 of the act of July 5, 1884, is mandatory, and provides that Chinese of the classes exempt under the treaty of 1880 or the act of 1884 "shall obtain" the permission of their Government to come to the United States, and shall be identified as so entitled, to be evidenced by a certificate, which shall conform to certain requirements and be visèed by the diplomatic or consular representatives of the United States in the country from which the certificate issues, or at the port whence the person in question is about to depart. One requirement is, if the applicant for admission is a merchant, that the certificate shall state the nature, character, and estimated value of his business. The case of *Wan Shing* v. *United States* (140 U. S., 424), confirming generally the necessity for the production of a certificate under the act of 1884, uses the language: "[The Chinese petitioner's] right to land, therefore, rested upon his establishing the fact that he was not a laborer." But this is to be understood as limited by the subsequent language of the court, viz: "Every Chinese person, other than a laborer, who may be entitled by [the treaty of 1880 and the act of 1882 as amended by the act of 1884] to come within the United States * * * shall be identified," etc. In other words, merely not to be a laborer is not conclusive of an applicant's right to admission.

It has been held by your Department that the omission of any of the statutory requirements from a certifi-

cate is a fatal defect, and that the provisions of the treaty of 1894 (presently to be referred to) do not waive any of the requirements of section 6 of the act of 1884 as to certificates of merchants and others of the exempt classes (*United States* v. *Yong Yue*, 83 Fed. Rep., 832) in accordance with 21 Op., 6; id., 68. I concur in the opinions of my predecessor on these points. While it may be argued with force that the treaty of 1894, being the later law, may modify the requirements of previous legislation in some respects (21 Op., 347), I do not believe it can be successfully contended that because the language of the treaty of 1894 respecting the certificate of the exempt classes (Art. III, " * * * Chinese subjects, being officials, etc., * * * *may* produce a certificate," etc.) is not mandatory, but merely permissive, therefore the requirements of the act of 1884 are so far modified that substantial compliance therewith is sufficient. On the contrary, assuming for a moment that a "trader" is entitled to admission as in practical meaning "a merchant," I am of the opinion that a certificate which fails to state the "nature, character, and estimated value of the business" is fatally defective. Furthermore, the statutory definition of merchant (section 2, act of November 3, 1893, 28 Stat., 7) requires the merchant's business to be conducted in his name, which would exclude from classification as a merchant a clerk or "merchant's assistant," which is what "trader" appears to be. (21 Op., 5.) But the opposite hypothesis, that a "trader" is not a "merchant," and the elements of the latter's certificate are not requisite, leads us to considerations affecting the right of a "trader" to admission at all, which relegate to the background the question as to the proper form of certificate.

Laying aside as obviously not conclusive the general permissive language of our Chinese legislation, particularly of the earlier treaties and acts, e. g., Article V of

the treaty of 1858, recognizing the mutual advantage of free migration "for purposes of curiosity, of trade, or as permanent residents," it may be stated comprehensively that the result of the whole body of these laws and decisions thereon is to determine that the true theory is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. This view is recognized by the general name under which the laws are known, viz: The Chinese exclusion acts. Rights have been conferred which may be enlarged, diminished, or taken away altogether at the will of Congress when the existing treaty obligations expire, as a larger measure of rights existing in the past has already been withdrawn. (*Chae Chan Ping* v. *United States*, 130 U. S., 581; *Nishimura Ekiu* v. *United States*, 142 U. S., 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S., 698; *Lem Moon Sing* v. *United States*, 158 U. S., 538; *Wong Wing* v. *United States*, 163 U. S., 228.)

The exempt classification is marked out by the phrase "officials, teachers, students, merchants, or travelers for curiosity or pleasure." While the suspension of Chinese immigration, foreseen in Article I of the treaty of 1880, was made to apply only to "Chinese who may go to the United States as laborers," the recognition of positive right in Article II describes the favored classes as "teachers, students, merchants, or [those proceeding to the United States] from curiosity." As the legislation by successive acts developed the view of the subject indicated above, which may be conceded to be a departure from or even a reversal of the early theory, those exempt were limited more strictly and defined more sharply. The acts of 1882 and 1884 exempted specifically only diplomatic and other officers of the Chinese Government and their body and household servants, and referred in section 6 of each act to Chinese persons other than laborers "who may be entitled by said treaty [1880] and this act to come

within the United States." The act of September 13, 1888 (25 Stat., 476), which has been generally held not to have gone into effect (although there are conflicting decisions respecting the existing validity of certain portions of it), used the phrase "Chinese officials, teachers, students, merchants, or travelers for curiosity or pleasure," to describe the exempt classes. The act of May 5, 1892 (27 Stat., 25), by section 6 authorizes a certificate of residence to be issued to a "Chinese person other than a laborer having a right to be and remain in the United States." (See also sec. 1 of the act of November 3, 1893, 28 Stat., 7.) Finally the treaty of 1894 adopted the exact phraseology used in the abortive act of 1888.

From this review it appears that a "trader" is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them unless as a "merchant." But in consequence of views hereinbefore expressed, especially with reference to the statutory definition of a "merchant," it is obvious that those described by the United States consular officer who maintains this classification as proper and legally exempt, and devised the appropriate certificate as men "who assist merchants in managing their business, such as salesmen, buyers, clerks, etc.," are not entitled to admission to this country. Although they may be, as stated by the consul in question, "a useful class who render valuable service as traders to merchants in the conduct of their business," it will, in my opinion, require additional enabling legislation by Congress to admit them.

I therefore answer the question proposed in the negative, and return herewith the original papers inclosed, as you request.

Very respectfully,

JOHN W. GRIGGS,
Attorney-General.

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No. 195. 27

Statement of Atty. Gen.

Office Supreme Court U. S.
FILED
APR 20 1900
JAMES H. McKENNEY,
Clerk.

Filed April 20, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

LI SING, PETITIONER,
v.
THE UNITED STATES. } No. 195.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

LI SING, PETITIONER,
v.
THE UNITED STATES. } No. 195.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT ON BEHALF OF THE UNITED STATES.

This statement is filed by leave of the court chiefly to show the irregularity of the petitioner's certificate, that question having been first emphasized at the oral argument.

The certificate, issued by the Chinese consul at New York, refers for its authority to section 6 of the act of 1882 as amended by the act of 1884, to Article II of the treaty of 1880, and to a Treasury circular dated August 1, 1891 (Tr. Dec. 11606). Section 4 of the act of 1882 as amended provided for a return or identification certificate to be furnished to certain Chinese laborers departing from the United States, by the collector of customs or his deputy, which entitled such laborers to return

to this country upon producing that certificate. All rights of laborers under that section were taken away by the act of October 1, 1888. Section 6 of the act of 1882 as amended prescribed a certificate for every Chinese person other than a laborer who may be entitled to come within the United States and "who shall be about to come to the United States," which evidenced, among other matters, the permission of and identification by the Chinese Government of the applicant as so entitled, and made this certificate the sole evidence permissible on the part of the person producing the same to establish his right of entry into the United States. Section 12 of that act, as amended, required the certificate prescribed to be produced by Chinese persons entering the United States by land as well as by those landing from a vessel. The certificate was declared to be the only *prima facie* evidence of the facts set forth. There was no specific provision in those acts for any certificate to show the right to leave this country and return, or for the identification of Chinese persons, other then laborers, who were entitled to come within the United States. (*Lau Ow Bew* v. *United States*, 144 U. S., 47, 63.) Accordingly, it was required, in the administration of the laws up to March, 1892, that all Chinese persons other than laborers, whether entering the country for the first time or returning after a temporary absence, should produce the certificate prescribed by section 6 of the act of 1884, and the Treasury circular referred to *supra* quoted the full text of the decision in the case of *Wan Shing* v. *United States* (140 U. S., 424) as the authority for this view.

By the Lau Ow Bew decision, which was rendered March 14, 1892, it was held that it was incongruous and unreasonable to exact of a Chinese merchant duly domiciled in this country and returning thereto the certificate of the act of 1884, and (in effect) that other proofs of identity might be sufficient. By Treasury decision 11,291 certificates of Chinese consuls in countries foreign to China (apparently, however, other than the United States) were recognized, but this concession was considered to have been revoked by the Treasury circular of August 1, 1891. By the opinion of Attorney-General Olney (20 Op., 693), it was held that a certificate under the act of 1884 might be issued by a Chinese consul in a foreign land as the certificate of the Chinese Government, which had the right to select the consul as its agent for this purpose. By the opinion of Attorney-General Harmon (21 Op., 481) it was held that the consul's authority to act for the Chinese Government was not to be presumed; and by later opinions and rulings it is now held by the Departments (Treasury Dig., Chinese Laws and Decisions, *ut infra*) that the certificate of a Chinese consul in this country or any other country foreign to China is not a valid certificate under the act of 1884. Some of the rulings related to Chinamen of the exempt classes who were coming to this country for the first time (see also *United States* v. *Mock Chew*, 54 Fed. Rep., 490); it does not appear clearly, from an examination as thorough as possible within the time allowed for filing this statement, whether any of the rulings apply to such Chinamen returning.

It will be perceived that the Executive rulings are somewhat conflicting (Dig. "Chinese Exclusion" Laws and Decisions, Treasury Department, 1899, pp. 28, 29); but paragraph 34 of the Chinese Regulations of 1896, page 10, declares that certificates of Chinese consuls are not recognized unless the authority of their Government therefor is shown, and paragraphs 10 and 11, page 33, of the Regulations of 1899 are to the same effect. All of these were regulations duly promulgated and are controlling.

The Lau Ow Bew case pointed out the unreasonableness and absurdity of the view that the Chinese Government should certify to facts respecting an applicant's domicile and business in this country, which were more properly in the cognizance of this Government. In other words, it held that the phrase in section 6 of the act of 1884 "and who shall be about to come to the United States" referred to those Chinese persons who were coming here for the first time, and not to those returning. The United States now submits, on a similar view, that in reference to a merchant departing from this country and desiring to return, it was the permission of and identification by this Government, rather than by the agent here of the Chinese Government, which was necessary or appropriate to show such applicant's right to go and come of his own free will and accord. Therefore the petitioner's certificate is incongruous as well as irregular under the rulings, and as it relies for authority on those certificate provisions of the act of 1884 which are applicable only to those coming here for the first time, it can not be held to furnish the petitioner

with a charter establishing his status and showing his right either to remain in this country or to depart and return thereto. At best, if there were no such objections to it as are now pointed out, it would, by the very terms of the law on which it is founded, make but a *prima facie* case.

It may also be suggested that the act of May 5, 1892, which became a law more than a year before the petitioner left this country in 1893, gave Chinese persons other than laborers, having a right to be and remain in the United States, a proper certificate of residence or identification as evidence of such right, which the petitioner, if he were entitled thereto, might have obtained. This, rather than the certificate which he took out with him to China and produced on his return, was the regular certificate for his case; although, while it might have been conclusive in essence (if it were genuine and the applicant's identity were established), he would still probably have been required, under the act of 1893, to establish his former status here as a merchant by the testimony of two credible witnesses other than Chinese. There seems to be no law or regulation requiring such testimony to be oral. But under the certificate actually produced we contend that he was necessarily required to furnish such testimony at the frontier. Although the act of 1893 was passed after he left this country, the decision in the *Chinese Exclusion Case* shows that that fact makes no difference; and if there is any presumption that he did produce to the collector at the frontier the testimony of two credible witnesses other than Chinese, to give such presumption

conclusive effect would be to deny the right of the Government to disprove the facts stated in his certificate, and the right to require of him affirmative proof to the satisfaction of the commissioner, which rights on the part of the Government were originally recognized in section 6 of the act of 1884 and preserved by the act of August 18, 1894, as to controverting the certificate, and were made clear by section 3 of the act of 1892 as to the burden of proof. The constitutionality of these very provisions or of similar provisions has been fully sustained by the court.

In reference to opposing counsel's remarks concerning the Government brief, there was no impropriety or unfairness in the discussion of the Ping Yik and Pin Kwan cases. The facts in those cases sufficiently appear in the opinions of the circuit court of appeals given in the appendix to the Government brief. The cases were brought to the court's attention in order to show how the claim that an employee in a merchant firm is himself a merchant was disposed of after careful argument by a circuit court of appeals. The cases are as yet unreported. The court was merely informed by the Government brief of the facts and the decisions. There was no intention or effort to prejudice those cases, to impose upon the present case the record in those cases, nor to mislead this court regarding them. The court was expressly advised that they were likely to be brought here for review. Further, being discussed in the Government brief for the information of the court and to show how the underlying question arises, all of the references to those cases might

have been omitted from the brief without affecting in the least the argument made respecting the underlying question as applied to the present case. That question is fairly presented by this record. It starts from the concession of the Government, for the sake of argument, that Li Sing, even if not a laborer at all, and even if connected, as he alleges, with a merchant firm, was not included in any one of the classes of Chinese persons other than laborers who alone are entitled to enter this country. The argument of the Government plainly indicated that the determination of this question was not necessary to the determination of Li Sing's case, and the Government stood upon the facts proved showing him to be a laborer, and upon the commissioner's right to deport.

HENRY M. HOYT,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 27.—October Term, 1900.

Li Sing, Petitioner, vs. The United States. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 18, 1901.]

In June, 1893, Li Sing, a native of China, but then a resident of Newark, New Jersey, returned to China and took with him a certificate purporting to have been issued by the imperial government of China, at its consulate at New York, and signed by its consul, that he was permitted to return to the United States and was entitled to do so, and which, furthermore, styled him a wholesale grocer. This certificate was viséd in Hong Kong by the United States consul on June 27, 1896, when Li Sing was about to return to this country. He thereafter returned by the way of Canada, presented the certificate to the United States collector of customs at Malone, New York, who cancelled it on August 28, 1896, and permitted him to enter the country.

On January 6, 1897, the United States officer, who is called the United States inspector for the port of New York, represented in writing and under oath to John A. Shields, United States commissioner for the Southern District of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was and had been for many years a Chinese laborer. Whereupon he was brought before the commissioner for examination. It was claimed by the counsel for Li Sing before the commissioner that by the action of the collector of customs at Malone the question of the Chinaman's right to be and remain in this country was *res adjudicata*, and also that he was a merchant. Testimony as to his status as a merchant was given by Chinese witnesses exclusively, which was received by the commissioner, notwithstanding the objection of the attorney of the United States. The commissioner found, upon all the evidence, that Li Sing was, at the time of the examination, a Chinese laborer, that he was such at the time he departed for China, and for several years prior thereto, and was such after his return from China in August, 1896.

The commissioner ordered his deportation, but did not order imprisonment as a punishment or penalty. A writ of *habeas corpus* and a writ of certiorari were thereupon allowed by the Circuit Court for the Southern District of New York upon Li Sing's petition. After a hearing the writ

of *habeas corpus* was dismissed, and the relator was remanded to the custody of the United States marshal for deportation. An appeal was then taken by the relator from the order of the Circuit Court to the Circuit Court of Appeals for the Second Circuit, and, on April 7, 1898, that court affirmed the order of the Circuit Court.

A writ of certiorari was thereafter, on February 1, 1899, allowed by this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

The first contention on behalf of the petitioner is that the collector of customs at Malone had exclusive jurisdiction to hear and determine the right of petitioner to enter the country; that any error committed by the collector could only be reviewed by the Secretary of the Treasury, and that, consequently, the commissioner had no jurisdiction to act in the present case.

This contention is based upon the provisions of section 12 of the act of September 13, 1888, (25 Stat. 476,) as follows: "And the collector shall in person decide all questions in dispute, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise."

Doubtless, if this section had gone into effect and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final as to the questions passed on by him. But the act of September 13, 1888, was passed to take effect upon the ratification of a treaty then pending between the United States and the Emperor of China, and it is conceded that such treaty never was ratified.

Thereupon, the treaty not having been ratified, the act of October 1, 1888, (25 Stat. 504,) was passed, which declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States, and who had departed or might depart therefrom, and should not have returned before its passage, to return to or to remain in the United States, and that no certificates of identity, under which by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued, and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue of any such certificate.

The effect of this act was considered by this court in the case of *Wan Shing* v. *United States*, (140 U. S. 424,) decided May 11, 1891. In the opinion in that case the act of July 5, 1884, (23 Stat. 115,) was cited as still in force, which provided that any certificate given by the Chinese government, and viséd by the endorsement of the diplomatic or consular repre-

sentative of the United States in China, shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States, at which the person named therein shall arrive, and after produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate might be controverted and the facts therein stated disproved by the United States authorities.

In summing up a review of the existing acts of Congress, the court, in that case, through Mr. Justice Field, said:

"The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning."

The counsel for the petitioner cite cases in some of the Circuit Courts of the United States in which it has been held that some of the provisions of the act of September 13, 1888, notwithstanding the treaty was not ratified, could be regarded as in force.

Without finding it necessary to say that there are no provisions in the act of September 13, 1888, which, from their nature, are binding on the courts, as existing statements of the legislative will, we are ready to hold that section 12 of that act cannot be so regarded. In the act of August 18, 1894, (28 Stat. 390,) it was provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

And in the case of *Lem Moon Sing* v. *United States*, (158 U. S. 538, 547,) it was held, expounding the act of August 18, 1894, that the decision of the appropriate immigration or custom officers, excluding an alien from admission into the United States under any law or treaty, is made final in every case, unless, on appeal to the Secretary of the Treasury, it be reversed. But it is obvious that it is only when the decision of the customs officer excludes an alien from admission that his decision is final. When his decision admits the alien, then the provisions of the act of July 5, 1884, are still applicable, which provide that, notwithstanding the contents of the certificate exhibited to the collector of customs, and their *prima facie* effect, "such certificate may be controverted and the facts therein stated disproved by the United States authorities."

Accordingly, we agree with the courts below in holding that the judgment of the collector of customs at Malone did not conclude the commissioner, and that the latter had authority, under the statutes, to hear and

determine the question whether Li Sing was entitled to remain within the limits of the United States.

The decision of the collector of customs not being conclusive as to the right of the petitioner to enter the United States, much less as to his right to remain therein, we are brought to consider the errors assigned to the acts of the commissioner in the proceedings before him.

Those proceedings were instituted under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884, (23 Stat. 115,) which provides that "no Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came." Such required certificate in regard to persons not laborers, as specified in the sixth section of the said amended act, was to be obtained from the Chinese government by every Chinese person, other than a laborer, who was about to come to the United States, and was for the purpose of identifying the person and evidencing the permission of the government for his departure. The section provides that this certificate "shall be produced to the collector of customs of the port in the district of the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States, whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

The certificate produced by the petitioner, of which we are furnished with a copy, bears date the 13th day of June, 1893, purports to permit Li Sing to return to and remain within the United States, and states that he was a wholesale grocer. But it appears, on the face of the certificate, that it was not issued to Li Sing by the Chinese government when he was about to return from China to the United States, as prescribed in the sixth section of the act of July 5, 1884, but was a paper he had procured from the Chinese consul at New York before he left the United States, Such a paper can scarcely be regarded as the certificate provided for in the act of Congress, which, in terms, declares that "in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or by this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government."

Without, however, insisting that the certificate produced was not, in form and substance, within the act of July 5, 1884, and even if it were

conceded that it was so, yet such a question was rendered irrelevant by the act of November 3, 1893, (28 Stat. 7,) which, in its second section, provided that "where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

It is not pretended that any such evidence was produced by the petitioner before the collector of customs, and it is conceded that the latter acted, in admitting Li Sing to enter the United States, solely on the strength of the certificate. Accordingly, under the provisions of the several statutes hereinbefore cited, it was not only competent for the commissioner to permit the allegations of the certificate to be controverted, but also to insist on the production of the evidence prescribed as necessary by the second section of the act of November 3, 1893.

As the commissioner found, upon all the evidence, that Li Sing was a Chinese laborer, was such at the time he departed from China and for a term of years prior thereto, and has remained such since his return from China, his order of deportation was a legitimate conclusion and should be carried into effect, unless it can be made to appear either that the commissioner failed to obey the statutes under which he was acting, or that the provisions of those statutes, applicable to the facts of the present case, are unconstitutional and void.

We do not understand it to be asserted, on behalf of the petitioner, that the commissioner disregarded, in any particular, the provisions of the several statutes; but it is claimed that some of those provisions are invalid, and that, therefore, the sentence of deportation should be set aside.

The petitioner's counsel assails the validity of the third section of the act of 1892, in the following terms:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

It is said that it was not competent for Congress to cast the burden of proof upon the petititioner. This precise question was determined by this court in the case of *Fong Yue Ting* v. *United States,* (149 U. S. 698, 729.) It was there said:

"If no evidence is offered by the Chinaman, the judge makes the order of deportation, as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves 'an unavoidable cause,' within the meaning of the act, for not procuring one. If he proves that he had procured a certificate which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof. The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof 'by at least one credible white witness that he was a resident of the United States at the time of the passage of the act,' is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.' (*Ogden* v. *Sanders*, 12 Wheat. 349; *Pillow* v. *Roberts*, 13 How. 476; *Cliquot's Champagne*, 3 Wall. 143; *Ex parte Fisk*, 113 U. S. 721; *Holmes* v. *Hunt*, 122 Mass. 505, 519.)"

Again, it is contended that section 2 of the act of November 3, 1893, (28 Stat. 7,) prescribing that "where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses, other than Chinese, the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States," &c., is violative of the Constitution which guarantees equal rights and equal laws to all.

This argument was also considered in the case of *Fong Yue Ting* v. *United States*, and it was said:

"The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may, at its discretion, modify or repeal. (Rev. Stat. 558, 1977.) The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field in *Chae Chan Ching* case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.' (130 U. S. 598.) And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.' . . .

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime

or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

It may be proper here to mention that this court has held that, while the United States can forbid aliens from coming within their borders, and expel them from the country, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials, yet, when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. (*Wong Wing* v. *United States*, 163 U. S. 228.)

We cannot, however, yield to the earnest contention made in behalf of inoffensive Chinese persons who seek to come within the limits of the United States and subject themselves to their jurisdiction, by modifying or relaxing, by judicial construction, the severity of the statutes under consideration. We can but repeat what was said to similar appeals in the case of *Fong Yue Ting* v. *United States*, above cited: "The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

The judgment of the Circuit Court of Appeals, affirming the order of the Circuit Court, is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.